THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346·4
Mx. North Gall.

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-family-division_1943

1943.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL:

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR – – – RALPH SUTTON, K.C.
ASSISTANT-EDITOR – G. F. L. BRIDGMAN, *Barrister-at-Law.*

REPORTERS:

Court of Appeal	H. C. GARSIA, J. W. HALL,	*Barristers-at-Law.*
Probate and Divorce	T. A. HARRISON,	*Barrister-at-Law.*
Admiralty Cases	E. C. M. TREHERN,	*Barrister-at-Law.*
Ecclesiastical Cases	W. L. L. BELL,	*Barrister-at-Law.*

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6, STONE BUILDINGS, LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY WATERLOW & SONS LTD., LONDON WALL, LONDON.

BIBL. LONDIN UNIV.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

EX-OFFICIO MEMBERS.

RIGHT HON. SIR D. B. SOMERVELL, K.C., M.P. ATTORNEY-GENERAL.

SIR D. P. MAXWELL FYFE, K.C., M.P. SOLICITOR-GENERAL.

ERNEST EDWARD BIRD, Esq. President of the Law Society.

ELECTED MEMBERS.

Chairman—SIR HERBERT CUNLIFFE, K.C., Lincoln's Inn.

Vice-Chairman—SIR STANLEY POTT, Law Society.

SIR JOSHUA SCHOLEFIELD, K.C.	Middle Temple.
G. DUDLEY COLCLOUGH, Esq.	Law Society.
MEYRICK J. L. BEEBEE, Esq.	Inner Temple.
J. H. STAMP, Esq.	Lincoln's Inn.
H. J. WALLINGTON, Esq., K.C.	Gray's Inn.
H. B. VAISEY, Esq., K.C.	Bar Council.
W. PRICE, Esq.	Middle Temple.
SIR CHARLES DOUGHTY, K.C.	Bar Council.
J. G. TRAPNELL, Esq., K.C.	Inner Temple.
W. LENNOX MCNAIR, Esq.	Gray's Inn.

Secretary—J. H. BOWMAN, Esq.,

6, Stone Buildings, Lincoln's Inn, London, W.C.2.

JUDGES

OF THE

PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1943.

Lord MERRIMAN, President.

Sir ALFRED TOWNSEND BUCKNILL.

Sir STEPHEN OGLE HENN COLLINS.

Sir FRANCIS LORD CHARLTON HODSON.

Sir GONNE ST. CLAIR PILCHER.

ATTORNEY-GENERAL.

Sir DONALD BRADLEY SOMERVELL.

SOLICITOR-GENERAL.

Sir DAVID PATRICK MAXWELL FYFE.

JUDGES

OF

THE COURT OF APPEAL.

1943.

Viscount SIMON, Lord Chancellor.

Viscount CALDECOTE, Lord Chief Justice of England.

Lord GREENE, Master of the Rolls.

Lord MERRIMAN,	President of the Probate, Divorce and Admiralty Division.
Sir LESLIE FREDERIC SCOTT,	Lords Justices.
Sir FRANK DOUGLAS MACKINNON,	
Viscount FINLAY,	
Sir ARTHUR FAIRFAX CHARLES CORYNDON LUXMOORE,	
Sir RAYNER GODDARD,	
Sir HERBERT DU PARCQ,	

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1943, will be as follows :—

In the First Series,
[1943] Ch.

In the Second Series,
[1943] K. B. [1943] P.

In the Third Series,
[1943] A. C.

TABLE OF CASES REPORTED
IN THIS VOLUME.

	PAGE
A.	
Acworth *v.* Acworth	21
B.	
Blyth *v.* Blyth	15
C.	
Clarke *v.* Clarke	1
Collins *v.* Collins	106
E.	
Eastham *v.* Eastham	53
Empire Antelope, The	79
G.	
Glenroy, The	109
H.	
Hays *v.* Hays	55
Higgins *v.* Higgins & Bannister	58
J.	
Jacobs *v.* Jacobs	7
Joss *v.* Joss	18
K.	
King *v.* King	91
L.	
Littlewood *v.* Littlewood	11
Lucas *v.* Lucas and High Commissioner for India	68
Luccioni *v.* Luccioni	49
O.	
Oropesa, The	32
P.	
Panaghiotis, The	4
Petty *v.* Petty	101
Pomona, The	24
Q.	
Quercus, The	96
R.	
Radchurch, The	79
Ramsden, The	46
Rippon, In estate of	61
Robinson *v.* Robinson	43
S.	
Salabangka	13
W.	
Wilkes *v.* Wilkes	41

CASES AFFIRMED, FOLLOWED, AND JUDICIALLY DISCUSSED.

Dormer v. *Ward* - - - [1901] P. 20
Followed. JACOBS *v.* JACOBS
C. A. 7

Hargreaves v. *Hargreaves* - [1926] P. 42
Test laid down by Hill J., at p. 45, applied. Joss *v.* Joss
Henn Collins J. 18

Littlewood v. *Littlewood* - [1943] P. 11
Distinguished. WILKES *v.* WILKES
Hodson J. 41

Manners v. *Manners* - - [1936] P. 117
Distinguished. PETTY *v.* PETTY
Divl. Ct. 101

Oropesa, The - - - [1942] P. 140
Affirmed - - - **C. A. 32**

Pomona, The - - - [1943] P. 24
Dictum as to discretion not followed. THE GLENROY
Lord Merriman P. 109

Rockabill, The - - - [1937] P. 93
Observation of Scott L.J., at p. 110, considered. THE SALABANGKA
Bucknill J. 13

Smith v. *Smith* - - - [1940] P. 49
Followed. WILKES *v.* WILKES
Hodson J. 41

Sovfracht (v/o) v. *Van Udens Scheepvaarten Agentuur Maatschappij (N.V. Gebr)* [1943] A. C. 203.
Dicta discussed and explained. THE GLENROY
Lord Merriman P. 109

Williams & Sons, Ld. v. *Port of London Authority* (1933) 47 Ll. L. Rep. 81.
Principles stated in applied. THE QUERCUS - - **Bucknill J. 96**

Winter v. *Winter* - - - [1942] P. 151
Distinguished. PETTY *v.* PETTY
Divl. Ct. 101

RULES JUDICIALLY CONSIDERED.

Matrimonial Causes Rules, 1937 (*St. R. & O.*, 1937, *No.* 1113, *L./14*), *r.* 36 (1), (2).
PETTY *v.* PETTY - **Divl. Ct. 101**

Matrimonial Causes (*Amendment*) (*No.* 1) *Rules*, 1943 (*St. R. & O.*, 1943, *No.* 240, *L./7*), *r.* 3.
EASTHAM *v.* EASTHAM **Pilcher J. 53**

Prize Court Rules, 1939, *Or.* I., *r.* 22; *Or.* III., *r.* 5; *Or.* XX.
THE GLENROY
Lord Merriman P. 109

R. S. C., Or. XLV., *r.* 1. LUCAS *v.* LUCAS
Pilcher J. 68

STATUTES JUDICIALLY CONSIDERED.

1837.

Wills (1 *Vict. c.* 26), *s.* 11. IN ESTATE OF RIPPON - **Pilcher J. 61**

1857.

Matrimonial Causes (20 & 21 *Vict. c.* 85), *s.* 42. LUCCIONI *v.* LUCCIONI
C. A. 49

1894.

Merchant Shipping (57 & 58 *Vict. c.* 60), *s.* 471, *sub-ss.* 1, 2, 3. THE EMPIRE ANTELOPE. THE RADCHURCH
Divl. Ct. 79

1895.

Summary Jurisdiction (*Married Women*) (58 & 59 *Vict. c.* 39), *s.* 4. CLARKE *v.* CLARKE - - **Divl. Ct. 1**

1925.

Supreme Court of Judicature (*Consolidation*) (15 & 16 *Geo.* 5, *c.* 49), *s.* 177, *sub-s.* 1. EASTHAM *v.* EASTHAM
Pilcher J. 53

Supreme Court of Judicature (*Consolidation*) (15 & 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-s.* 1. ROBINSON *v.* ROBINSON
Henn Collins J. 43

—— —— *s.* 192. JACOBS *v.* JACOBS
C. A. 7

Joss *v.* Joss - **Henn Collins J. 18**

1937.

Matrimonial Causes (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2. LITTLEWOOD *v.* LITTLEWOOD - - - **Pilcher J. 11**

—— —— *s.* 2 (*b*). WILKES *v.* WILKES
Hodson J. 41

1938.

Administration of Justice (*Miscellaneous Provisions*) (1 & 2 *Geo.* 6, *c.* 63), *s.* 14, *sub-s.* 1 (*b*). ACWORTH *v.* ACWORTH - - - **C. A. 21**

CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

CLARKE *v.* CLARKE.

1942

July 1.

Justices—Husband and wife—Wilful neglect to maintain—Venue — Wife's application for order in district of husband's residence — Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4.

By s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, any married woman whose husband shall have been guilty of specified matrimonial offences, including wilful neglect to provide reasonable maintenance for her or her children, " may apply to " any court of summary jurisdiction acting within the city, borough, " petty sessional or other division or district . . . . in which the " cause of complaint shall have wholly or partially arisen " for an order under the Act.

In 1931 the husband, who had been living with his wife, went into a sanatorium, and the wife went to live at Worthing. In 1932 the husband left the sanatorium, and went to live at Fordingbridge. He made no contribution to his wife's maintenance, and, in January, 1942, in reply to a letter from her solicitors asking him what arrangements he was prepared to make for her support, his solicitors stated that they had advised him that he had good grounds for commencing divorce proceedings against her on the ground of desertion, and that, therefore, " no offer of main- " tenance is forthcoming." In April, 1942, the wife summoned

1942

CLARKE v. CLARKE.

the husband at Fordingbridge petty sessions for a maintenance order on the ground of his wilful neglect to maintain her. It was submitted on behalf of the husband that the court had no jurisdiction to hear the summons because the cause of complaint had arisen within the Worthing district where the wife was resident. The justices overruled the objection and granted a maintenance order. The husband appealed :—

Held, that the court had jurisdiction to entertain the summons since the husband's wilful neglect to maintain, which was the cause of complaint, had arisen, at any rate partially, in the place in which he was living.

APPEAL from maintenance order.

The facts appear sufficiently in the headnote.

W. Harvey Moore for the husband.

Fairweather for the wife.

BUCKNILL J. The sheet anchor of the husband's case is the passage in Stone's Justices' Manual, 74th ed., p. 1034, in which it is stated that the proceedings in a case of this kind "must be taken at the place where the wife resided at the "time of desertion or refusal to maintain, whichever event "last occurred . . . . or the cause of complaint wholly or "partially arose," the authority for that proposition being *Reg.* v. *Leresche* (1). In that case, which was decided under the Married Women (Maintenance in case of Desertion) Act, 1886, the wife issued a summons at Salford, where she resided, against her husband for wilful neglect and wilful refusal to maintain. The point was taken that the justices had no jurisdiction in the matter, but the Divisional Court held that they had jurisdiction, and in the course of his judgment Day J. said: "That there was jurisdiction appears from the "fact that the wife resided at Salford at the time of the "refusal of the husband to maintain her. The wife complains "of a personal wrong which is incidental to the place where "she resides." Wills J. said: "The jurisdiction of the "magistrate must depend on the locality of the thing com- "plained of for which the jurisdiction is invoked. The thing "to be adjudicated on was an offence under the Married "Women (Maintenance in case of Desertion) Act, 1886. There are "two constituent elements which go to make up that offence— "namely, the wilful refusal to support, and the desertion. "It is not the place of one of these acts which would be

(1) (1887) 56 L. J. (M. C.) 135.

"sufficient to give jurisdiction, but rather the locality of the "last act making up the sum of the offence. The wilful "refusal to maintain being probably the last act committed "will generally be the place of jurisdiction."

In my view, the passage in Stone's Justices' Manual to which I have referred, goes farther than does the decision in *Reg.* v. *Leresche* (1). That case did not say that the proceedings *must* be brought in the district in which the wife resides and cannot be brought anywhere else. All it decided was that the proceedings *may* be brought in the district in which the wife resides. It seems to me that when the husband persists in the neglect to maintain and refuses to do anything, as is set out in a letter in the present case, the cause of complaint arises partially, at any rate, in the place in which he is living. I see no reason why the wife here could not proceed in the district in which the husband was residing, which was the place where prima facie it was his duty to provide an income and home for her.

HENN COLLINS J. I agree. Although the passage in Stone's Justices' Manual is a little apt to mislead if it is not read carefully to the end of the sentence, when it is so read it is seen that the latter part of it is much wider than the earlier, and it is stated, as an alternative, that the proceedings must be taken where the cause of complaint wholly or partially arose. In the present case it has been contended that the husband's wilful neglect to maintain could only arise in one place, but, in my view, it could arise both in the place where the wife ought to have received the maintenance and in that where the husband ought to have paid it.

Appeal dismissed.

Solicitors for husband: *Sharpe, Pritchard & Co., for Bell, Pope, Bridgewater & Hughes, Southampton.*

Solicitors for wife: *Vizard, Oldham, Crowder & Cash, for Parker, Bangor-Jones & Palmer, Worthing.*

(1) 56 L. J. (M. C.) 135.

W. L.

1942
July 13.

THE PANAGHIOTIS.

Prize—Costs—Crown party to proceedings—Reference to assess amount of compensation in lieu of freight.

On a reference to the registrar to assess the amount of compensation in lieu of freight due to shipowners for the carriage of a cargo seized and condemned as prize, the Crown is not in the position of an ordinary litigant as regards costs, and, in the absence of any wrongful or oppressive conduct on the part of the Crown, the shipowners are not entitled to the costs of proving their claim.

APPEAL by way of objection to registrar's report against allowance to claimants of their costs of establishing a claim to compensation in lieu of freight.

The claimants were the owners of the Greek steamship, *Panaghiotis*. At the outbreak of war the ship was carrying a cargo of iron ore destined for Germany, which was seized and afterwards condemned as prize. The claimants contended that the seizure had been made with the obligation to pay them compensation in lieu of freight, the voyage being an innocent voyage from their point of view. The registrar awarded a sum in excess of an offer which had previously been made by the Crown in writing, but less than the sum which was actually claimed, and he awarded the claimants the costs of the reference. The Crown moved an objection to the report.

J. V. Nesbitt for the Procurator-General. The Crown in prize cases is not ordered to pay costs unless guilty of negligence or some wrongful conduct. In *The Falk* (1) Lord Sumner said that "where there is a real question of law, a conflict "of testimony or a genuine doubt as to the inference to be "drawn from ascertained facts, the Procurator-General is not "to be visited with costs or damages merely on the ground "that he submits it to the judgment of the court instead of "taking the decision into his own hands. He is entitled to "have genuine doubts cleared up by the claimant to the "satisfaction of the court." See also *The Gabbiano* (2); *The Glenearn* (*No.* 2) (3); and *The Jurko Topic* (4). The Procurator-General is not aware of any case in which the

(1) [1921] 1 A. C. 787, 798.
(2) [1940] P. 166, 176, 177.
(3) [1942] P. 50.
(4) (1941) 1 Ll. L. P. C. (N. S.) 89, 95.

1942

THE PANAGHIOTIS.

costs of a reference have been ordered to be paid by him, and the registrar has misdirected himself.

Fairweather for the claimants. The question whether or no compensation in lieu of freight is payable is, no doubt, governed by prize law, that is, international law, but, the registrar, in assessing a mere question of quantum, is applying municipal law, and since the Administration of Justice (Miscellaneous Provisions) Act, 1933, the old rule that the Crown neither pays nor receives costs: *Johnson* v. *The King* (1); is altered. By s. 7 of that Act, costs in civil proceedings to which the Crown is a party, are in the discretion of the court, a discretion which the court must exercise on the same principle as in cases between subjects. The registrar had a discretion and he exercised it rightly.

Nesbitt, in reply, referred to *The Zamora* (2).

THE PRESIDENT (LORD MERRIMAN). It is argued on behalf of the Procurator-General that the registrar has erred as a matter of principle in awarding these costs, and reference is made to a well-known passage in *The Falk* (3), and to the application of the principles there laid down in cases which have arisen during the present war, notably *The Jurko Topic* (4) and *The Glenearn* (*No.* 2) (5). In particular, it is argued that the registrar failed to appreciate the application of those principles in *The Jurko Topic* (4) when he dismissed that case as having decided nothing material to the present question because the costs were agreed between the parties. I am bound to say that I think he has made a mistake in that matter. It is quite clear that, although the amount to be deducted from the costs which were allowed to the claimants in *The Jurko Topic* (4) was a matter of agreement between the parties, the question whether or not they should be allowed any costs in connexion with their claim for freight, as distinct from their claim for damages, was decided in favour of the Crown by reference to the principles to which I have already alluded.

Mr. Fairweather in effect admits that, unless he can distinguish the present case from those to which I have referred, he is out of court. He admits that in prize cases pure and simple the Crown is not to be mulcted in costs if

(1) [1904] A. C. 817, 824.
(2) [1916] 2 A. C. 77.
(3) [1921] 1 A. C. 787, 798
(4) 1 Ll. L. P. C. (N. S.) 89, 95.
(5) [1942] P. 50.

1942

THE PANAGHIOTIS.

The President.

no more is done in the litigation than to ask the court to decide the question of principle, but he says that, when the parties have had the question of principle decided, or it is admitted, and the question of amount then falls for decision, the position is no longer governed by rules applicable to the right of the Crown to immunity from costs in prize, but is to be decided on the ordinary principles applicable as between subject and subject so that the loser pays unless he has taken the appropriate municipal precautions to safeguard himself from having so to do. That argument, although attractive, seems to me to be unsound. I do not think that it is possible in a case such as this to draw any line between the question of principle and the mere quantification of amount. That is apparent when one looks at the rule laid down by Sir Samuel Evans in *The Juno* (1), and adopted during the present war in *The Glenearn* (*No.* 2) (2). Sir Samuel Evans laid down the principles by which the registrar and merchants should be governed in assessing compensation in lieu of freight as follows: "Such a sum is to be allowed for freight as is fair "and reasonable in all the circumstances, regard being had to "the rate of freight originally agreed (although this is not "necessarily conclusive in all cases), to the extent to which "the voyage has been made, to the labour and cost expended, "or any special charges incurred in respect of the cargo seized "before its seizure and unlivery, and to the benefit accruing "to the cargo from the carriage on the voyage up to the "seizure and unlivery; but no sum is to be allowed in respect "of any inconveniences or delay attributable to the state of "war, or to the consequent detention and seizure." If, in arriving at the amount, the registrar were to go contrary to any of those principles, as, indeed, he was thought to have done in *The Glenearn* (*No.* 2) (2), the matter could be tested as a matter of principle on appeal, so that, when Mr. Fairweather invites me to ask myself whether the right which these claimants were setting up was dependent on any international law, I feel bound to reply that the registrar could not arrive at any figure without directing himself in accordance with the principles laid down in *The Juno* (1), and applying them correctly.

To take the second test suggested by Mr. Fairweather, there is no doubt that the method of procedure employed to arrive at the result appealed against was governed by municipal

(1) [1916] P. 169. (2) [1942] P. 50.

1942

THE PANAGHIOTIS.

The President.

rules. The machinery is laid down in rules made, not by the Rules Committee of the High Court, but by the Privy Council for the Prize Court which has always been understood as being an international as distinct from a municipal court. That, however, is one thing, but to say that it means that the method of assessment of compensation is governed by municipal rules is another. In my view, *The Zamora* (1) makes it clear that there is all the difference between mere regulation of procedure by municipal law, which is perfectly legitimate, and an attempt to govern by municipal regulations the principles of international law to be administered by the Prize Court. I do not think that the mere fact that a reference to the registrar, as a matter of machinery, is regulated by municipal rules affects the matter one way or the other. It is admitted that there was no oppressive or improper conduct on the part of the Crown in this litigation which would take the case out of the ordinary rule, and I think, therefore, that the registrar came to a wrong conclusion as a matter of principle, and that he ought not to have awarded costs to the claimants.

Nesbitt. I am not asking for the costs of the hearing before the registrar, but I submit that this appeal should be allowed with costs. The costs of an appeal invariably follow the event.

THE PRESIDENT. Yes, I think I must award costs.

Appeal allowed.

Solicitor for Procurator-General: *Treasury Solicitor.*
Solicitors for claimants: *Middleton, Lewis & Clarke.*

(1) [1916] 2 A. C. 77.

E. C. M. T.

JACOBS *v.* JACOBS.

C. A.

1942

Oct. 6.

Divorce—Variation of settlements—Covenants for payment of annuities to wife after the husband's death—"If she shall so long remain a "widow and unmarried"—Decree of divorce—Subsequent death of husband — Wife's application to vary settlements by omitting condition of widowhood—Preliminary objection that settlements ceased on husband's death—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.

C. A.

1942

JACOBS
v.
JACOBS.

The power of the court under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, to inquire into and vary ante-nuptial and post-nuptial settlements made on parties whose marriage has been the subject of a decree of divorce relates to those settlements in existence at the time of the decree.

Dormer v. *Ward* [1901] P. 20 followed.

When, therefore, a husband made two post-nuptial settlements each consisting of a covenant by the husband for payment to the wife of a yearly sum during their joint lives and after his death if she should survive him for payment to her of another yearly sum during the remainder of her life " if she shall so long " remain a widow and unmarried " and before the husband's death a decree was made dissolving the marriage, the preliminary objection that the settlements had ceased to exist at the husband's death was not a ground for refusing an application by the wife, made after the husband's death, to have the settlements varied by omitting from the words " if she shall so long remain a widow and " unmarried " the words " a widow."

APPEAL from Langton J.

In August, 1896, Sydney Jacobs (the husband) married Theresa la Grange (the wife). By two settlements dated January 12, 1904, and May 21, 1905, consisting of covenants by the husband in the same form, the husband covenanted that he, his executors or administrators would pay to the wife the yearly sums of 60*l.* and 190*l.* during their joint lives, and, if he died in her lifetime, then from and after his death during the remainder of her life " if she shall so long remain a widow " and unmarried " the yearly sums of 150*l.* and 250*l.* On November 20, 1911, a decree absolute was made for the dissolution of the marriage. On April 21, 1940, the husband died, and in proceedings brought by his executors in the Palatine Court of Lancaster the Vice-Chancellor held, on the construction of the two settlements, that the wife, to be entitled to the 400*l.* a year, must fulfil the condition of being the widow of the husband, and that, as the marriage had been dissolved, it had become impossible for her to fulfil that condition. The wife appealed from this decision, and on October 29, 1941, the Court of Appeal stood the appeal over to enable her to seek leave to have the settlements varied notwithstanding the lapse of time. Henn Collins J. having given leave, the wife applied to have the settlements varied by omitting the words " a widow " from the condition in each settlement, " if she shall so long remain a widow and " unmarried." The husband's executors took the preliminary objection that the settlements had been extinguished at the

death of the husband, and, therefore, could no longer be varied. The registrar accepted the objection, but Langton J. overruled it and directed the registrar to proceed with the application. The husband's executors appealed.

Bush James K.C. and Morle for the executors. Admittedly, the husband's covenants constituted settlements, but, as the wife was not, at the time of her husband's death, his widow, and, owing to the dissolution of their marriage, never could be so, those covenants were terminated at the date of the husband's death and the settlements and the settled fund were at an end. From the date of the husband's death the executors could have distributed his estate, although in fact they did not do so. Executors are going to be in very great difficulty if it be possible to re-create settlements that have come to an end by varying their terms under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. The difficulty in the way of the appellants is that s. 192 provides that the court may inquire into the existence of settlements, and that in *Dormer* v. *Ward* (1), a case arising under an earlier Act, the Court of Appeal held that the existence of a settlement, for the purpose of its variation, turned on whether it existed at the date of the decree absolute and that the court had power to vary an ante-nuptial settlement containing a covenant to pay the intended wife an annual sum during her life although she was no longer the wife. Reference was there made to *Corrance* v. *Corrance* (2), but that case is of no assistance. [They also referred to *Bosworthick* v. *Bosworthick* (3).]

Fairweather for the wife. Sect. 192 of the Act of 1925 gives the court power to vary a settlement "after pro- "nouncing the decree," and this may be contrasted with the language of s. 190 relating to orders for maintenance "on any "decree." Thus, any settlement in existence at the time of the decree can be varied at a date after the decree: *Dormer* v. *Ward* (1). There are many examples of what the court has felt able to do, such as *Stone* v. *Stone* (4); *Ling* v. *Ling* (5); and *Newte* v. *Newte* (6); but this case is directly covered by *Dormer* v. *Ward* (1).

(1) [1901] P. 20.
(2) (1868) L. R. 1 P. & M. 495.
(3) [1927] P. 64.
(4) (1864) 3 Sw. & Tr. 372.
(5) (1865) 4 Sw. and Tr. 99.
(6) [1933] P. 117.

C. A. 1942 JACOBS v. JACOBS.

GODDARD L.J. The facts of this case are distinctly novel and there is no authority precisely in point. Mr. Bush James has contended that, as the wife was not a widow at the time of her husband's death, the husband's covenants to pay her the sums specified in the two settlements were then terminated and could not be revived. If that were sound, it could be said, in the event of a marriage being dissolved, that there was thenceforth no longer scope for the operation of such covenants and they must be considered to be at an end. It seems to me clear that that is not what the legislature intended when it enacted s. 192 of the Judicature Act, 1925, which section, it has often been said, must receive a wide interpretation.

There is no doubt in view of the authorities that these covenants by the husband to pay to his wife the sums mentioned are settlements. Each covenant is not only that the husband will pay during his life, but also that his executors will pay after his death. I may also add that Mr. Fairweather has pointed out to us that s. 192 of the Act of 1925 differs in one important respect from s. 190 which deals with the making of maintenance orders in that the power to make a maintenance order is to be exercised on the making of a decree while the power to vary settlements is to be exercised after the pronouncement of the decree. In my view, the matter is concluded, so far as this court is concerned, by *Dormer* v. *Ward* (1) in which a court of very high authority, consisting of Lord Halsbury L.C., Sir A. L. Smith M.R. and Vaughan Williams L.J., decided that the power to inquire into the existence of ante-nuptial or post-nuptial settlements for the purpose of varying them under the section of the Matrimonial Causes Act, 1859, which corresponded to s. 192 of the Act of 1925, applied to settlements in existence at the time when the final decree was pronounced. At the time of the pronouncing of the decree in the present case there were two settlements in existence each containing a covenant by the husband to pay an annual sum to the wife during their joint lives and a covenant binding his executors to pay her an annuity after his death. Therefore, it seems to me, the court can exercise the powers given by s. 192 over those settlements.

We are only dealing now with the question of the objection that was overruled by the learned judge that there was no settlement in existence. We are expressing no opinion on

(1) [1901] P. 20.

what should be done in these circumstances, or what it would be proper to do if in a similar case executors had distributed the estate before the wife petitioned for a variation of the settlement. All sorts of questions might then arise which would have to be dealt with by the court and it is not necessary for us to express any opinion on it. My decision simply is that there are here two settlements on which the powers of the court can be exercised, and that, therefore, the decision of the learned judge directing the registrar to proceed with the inquiry was right. This appeal should, therefore, be dismissed.

DU PARCQ L.J. I agree. Sect. 192 deals with the powers of the court after a decree of divorce has been pronounced. When the decree absolute is made the woman who was a wife has ceased to be a wife, and the section would become unworkable unless the construction placed on the corresponding section in the earlier Act in *Dormer* v. *Ward* (1) was adhered to, and it was held that the date at which one must look to ascertain what settlements can be dealt with by the court is the date of the decree. In my opinion, the learned judge was right. He was bound by *Dormer* v. *Ward* (1), and, bearing in mind that we are limiting our decision to the point mentioned by my Lord, I think it would be extremely regrettable if we had been forced to come to any other conclusion.

Appeal dismissed.

Solicitors: *Jaques & Co., for T. J. Smith & Son, Liverpool; Ralph Bond & Rutherford, for Bartley, Cocks & Bird, Liverpool.*

(1) [1901] P. 20.

H. C. G.

LITTLEWOOD *v.* LITTLEWOOD.

1942 *Oct.* 16.

Divorce—Desertion—Parties living under same roof—Wife's absences and silences—Withdrawal from sexual intercourse—Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.

By his petition dated November 19, 1941, the husband alleged that the wife had deserted him for at least three years immediately preceding the presentation of the petition. In July, 1937, the wife, against the husband's wish, engaged in employment which

1942

LITTLEWOOD v. LITTLEWOOD.

kept her away all day and sometimes she did not return home till 9 or 11 P.M. Early in 1938 she left home after it had come to her husband's knowledge that she was in love with another man, but she returned in June, 1938. She never slept in the same bedroom with her husband during the material three years, spoke to him but little and generally ignored him in the home, but she cooked the food when she was at home and occasionally performed other domestic duties. She finally left her husband in February, 1941 :—

Held, that the mere disagreeable conduct and failure by the wife to institute or continue conversation, even when added to the other matters of complaint, did not constitute desertion when both parties continued to occupy the same home.

UNDEFENDED petition for divorce on ground of desertion. The essential facts are set out in the headnote.

Victor Russell for petitioner.

PILCHER J. Two propositions are well established by authority. The first is that a mere refusal by a spouse of sexual intercourse and to share the same bedroom does not in itself constitute desertion. The second is that the mere fact that parties continue to reside under the same roof is no ground for saying that there cannot be desertion. The strongest case in which it was decided that, although the husband and the wife continued to live under the same roof, the facts justified the court in coming to the conclusion that desertion was proved, is *Smith* v. *Smith* (1). The parties there lived in a house which belonged to the husband. They quarrelled and ceased to sleep in the same bedroom, the husband going down to live with his mother in the basement of the house for nearly the whole of the relevant period. I gather that his mother there looked after him, cooked his meals, made his bed, and performed other domestic duties which would normally be performed by a wife. The wife lived on the ground floor and, so far as I know, looked after herself alone. The husband, having no sleeping accommodation in the basement, used to pass through the ground floor, go up to the first floor, and sleep there. On those facts the learned President decided that the husband had deserted the wife. Much as I sympathise with the husband in the present case, I think it would be taking the matter a great deal further than it has ever been taken before if I were to

(1) [1940] P. 49.

decide here that the wife has deserted him during the material period. No court has ever yet taken the view that one party to a marriage is entitled to claim relief on the ground of desertion merely because the other party absents himself or herself from the conjugal home during long working hours, provided that the home continues to be one home. Mere disagreeable conduct and failure to institute or continue conversation by one party, even when added to the other matters which have been mentioned, hardly seems to me to be sufficient to ground a claim for desertion by the other party when both parties continue to occupy the same home.

In my view this petition must be dismissed.

Solicitors for petitioner: *Joynson-Hicks & Co.*

W. L.

THE SALABANGKA.

1942
Nov. 2.

Shipping—Collision—Costs—Both to blame in unequal degrees—Discretion of court.

There is no rule in collision cases where the blame is unequally divided between the two vessels that the costs should be divided in the same proportion. The order as to costs is a matter for the discretion of the court in each case.

Observation of Scott L.J. in *The Rockabill* [1937] P. 93, 110, considered.

ARGUMENT on costs.

The plaintiffs were the owners of the steamship *British Workman*. The defendants and counter-claimants were the owners of the steamship *Salabangka*. Each side alleged that the other was alone to blame for a collision which took place in the River Mersey on September 9, 1941. The court found the *British Workman* "seriously to blame" for porting her wheel instead of starboarding in accordance with art. 18 of the Collision Regulations when the vessels were end on to each other and each had a duty to starboard and pass port to port. The *Salabangka* was also held to blame for coming down the river in her wrong water and thereby hampering the *British Workman* to some extent. The court found the *British Workman* seventy per cent. to blame and the *Salabangka* thirty per cent.

1942

THE SALA-BANGKA.

Gething (*Hayward K.C.* with him) for the defendants. The costs should be dealt with in the same proportions as the liability. In *The Rockabill* (1) Scott L.J. said that he thought "that ought to be the ordinary rule unless there is a reason "to depart from it," and, on counsel saying that he was instructed that that was not the ordinary rule, added " That "is the reason why I have said what I have."

Owen Bateson and Porges for the plaintiffs. There is no " rule," and the alleged rule was not followed by the Court of Appeal in *The MacGregor* (2). In *The Young Sid* (3) Scrutton L.J. said that the order as to costs was a matter for the judge in every case, and Hill J. laid down the principle in a considered judgment in *The Modica* (4). In *The Juliana* (5) Bucknill J. said : " It requires rather a strong case to make "me depart from my usual practice when both [ships] are "to blame. Each side should pay their own costs."

Gething, in reply, referred to *The Robert Koeppen* (6).

BUCKNILL J. The question which I have to decide is what is the proper order for the court to make as regards the costs. I do not think that Scott L.J. in *The Rockabill* (1) intended to lay down a rule that where the blame is unequally divided the costs should be dealt with in the same proportions. No doubt, it is helpful to the parties to know what is usually done in cases of this kind, but it is clear from the decisions of the Court of Appeal in *The Young Sid* (3) and *The MacGregor* (2), that in each case the order is left to the discretion of the judge. One only has to read the considered judgment of Hill J. in *The Modica* (4) to see that in every case now in the Admiralty Division the costs are in the discretion of the judge. Hill J. does say : " There are cases—I incline to "think many cases—in which to ignore the proportions in "which they "—that is, the vessels—"respectively succeed "and lose is to shut one's eyes to the real facts of the particular "case and to produce a result which is inequitable," but a little further on in the judgment he adds that where both vessels are held to blame in unequal degrees the court must be guided by the circumstances in each case. In *The Modica* (4) Hill J., although he found the ships to blame in unequal degrees, made no order as to costs, but a few months later

(1) [1937] P. 93, 110.
(2) (1942) 72 Ll. L. Rep. 261.
(3) [1929] P. 190.
(4) [1926] P. 72.
(5) (1942) 72 Ll. L. Rep. 141
(6) [1926] P. 81*n*.

1942

THE SALA-BANGKA.

in *The Robert Koeppen* (1), where the degrees of blame were more divergent than in *The Modica* (2), he made an order giving half the costs to the vessel which was the least to blame. In the present case, in my view, the court should have regard to the costs incurred by each side in dealing with the issues which were raised and the decision of the court on those issues. Considering the case from that point of view, I think that the proper order is to give the defendants one-third of their taxed costs.

Order accordingly.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendants: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

E. C. M. T.

(1) [1926] P. 81*n*. (2) [1926] P. 72.

BLYTH *v.* BLYTH.

C. A.

1942

Oct. 5.

Divorce—Maintenance—Order for payment of yearly sum to be secured by deed—Deed executed—Rescission of order—Jurisdiction.

In 1932 a maintenance order was made in divorce proceedings for the payment to the wife during her life of a yearly sum to be secured by deed, and a deed securing the payment was duly executed by the husband. In 1942 the wife entered into an agreement with the husband by which she accepted a lump sum in place of the yearly payment conditional on an order being obtained rescinding the maintenance order:—

Held (affirming Henn Collins J.), that the court had no power to rescind the maintenance order.

APPEAL from Henn Collins J.

On April 11, 1932, a decree absolute was made for the dissolution of the marriage of Francis Joseph Blyth and Winifred Ethel Blyth. By a maintenance order made on December 15, 1932, it was ordered that the husband should secure for the life of the wife for her maintenance the sum of 75*l*. a year free of tax, that sum to be secured on certain policies of insurance on the husband's life by a deed to be agreed between the parties or in default settled by conveyancing counsel, and,

C. A. 1942 — BLYTH v. BLYTH.

further, that the husband should pay to the wife during their joint lives and until further order further maintenance at the rate of 285*l.* a year free of tax and a sum of 100*l.* a year free of tax for each of the two children of the marriage, all these amounts to be payable as from April 11, 1932. On May 10, 1934, a deed was executed securing payment of the annuity of 75*l.* on the insurance policies. By a deed of compromise, dated June 25, 1942, the wife agreed to accept from the husband payment of the sum of 3000*l.* in full satisfaction and discharge of all claims by her for maintenance and that the policies of insurance should be released, but the deed was made conditional on the husband obtaining an order of the court for the discharge of the maintenance order and, if and so far as necessary, the approval of the deed of compromise. By a summons dated August 11, 1942, the husband applied for an order rescinding the maintenance order, and, if and so far as necessary, for the approval by the court of the deed of compromise.

Henn Collins J. dismissed the application, holding that he had no power to make the order asked for. The husband appealed.

Fairweather for the husband. The court has power to vary or rescind this order. It is true that it is an order to secure annual payments, but it is none the less an "order for the "periodical payment of money" within s. 196 of the Supreme Court of Judicature (Consolidation) Act, 1925, and, as such, capable of variation and modification. It is also true that in *Tangye* v. *Tangye* Sir Samual Evans, P., said (1) that an order made in divorce proceedings to secure an annual sum of money was "unalterable," but that case had to do with an order for periodical payments after a decree for restitution of conjugal rights, so the learned President's remarks were obiter and they should not be followed. Any difficulty felt by the court as to rescinding the maintenance order could be met by its extending the time for an appeal from that order.

R. T. Barnard for the wife.

GODDARD L.J. It seems clear that there is no power in the court to rescind that part of the order which directs the sum of 75*l.* to be secured for the life of the wife. Unless a court is given statutory power to rescind its own order, it cannot do so. The order is final so far as that court is concerned.

(1) [1914] P. 201, 209, 210.

If either party can show that there is something wrong with the order or can show that it ought not to have been made, the proper remedy is to appeal. If the court has been misled into making an order, it may be that in some circumstances the court has power to vary it, but even then, if the order has been drawn up, the aggrieved party must as a rule go to the Court of Appeal unless, indeed, there has been an irregularity in procedure or the order for some reason can be treated as a nullity, which is not the case here.

I do not propose to go through all the statutes to which we have been referred consisting of the Matrimonial Causes Acts of 1857, 1866, and 1884, and ending with the Supreme Court of Judicature (Consolidation) Act, 1925. None of these Acts gives power to the court to rescind an order for payment of a sum of money to be secured. In the present case the deed securing payment has been executed and would remain even if the court could rescind the order. If the order for the execution of the deed had been obtained by misrepresentation that would be a ground for getting the deed set aside, but here there has been nothing more than a change of mind and that is no ground for obtaining rescission of the order.

The Administration of Justice (Miscellaneous Provisions) Act, 1938, by s. 14, sub-s. 1, gives the court power to "discharge or vary" certain orders made by it, but not one made for securing the payment of an annual sum of money for maintenance. The learned judge, therefore, was right in holding that he had no power to discharge that part of the order directing payment of the sum of 75*l.* a year to be secured.

I think that it is conceded that that part of the order which provides for the payment of 285*l.* a year to the wife and of 100*l.* a year to each of the children could have been rescinded by the learned judge. Apparently, he was not asked to rescind that. We are asked to rescind the order as a whole, and so we are not going to rescind a part. Mr. Fairweather suggested that a way out of the difficulty would be to give leave to appeal against the maintenance order. In our opinion, that would not be a proper course to take as no fault can be found with the order, and no one suggests that there has been any change of circumstances to justify us in saying that the order should be reviewed. There being no power in this court to rescind the order, it would not be right for us to achieve the same result by a side wind. The appeal fails and must be dismissed.

C. A. 1942 BLYTH v. BLYTH.

DU PARCQ L.J. I agree. After having my attention called to the relevant sections I am satisfied that Henn Collins J. was right in holding that the court has no power to rescind the order.

Appeal dismissed.

Solicitors for husband: *Coe & Robinson.*
Solicitors for wife: *Willis & Willis.*

H. C. G.

1942 *Oct.* 20; *Nov.* 10.

JOSS *v.* JOSS.

Divorce—Variation of settlement—Post-nuptial settlement—No recital of existing marriage or wife or child in settlement—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.

Parties were married in 1930, and two children of the marriage were born in 1932 and 1934 respectively. By a protective settlement dated October 19, 1933, the husband settled property on himself with power to charge or assign income from the trust funds " in favour of any child or children of his," and to appoint by will or deed to " any wife who may survive him " during her life or a less period. Neither his wife nor the elder child was named or specifically indicated in the settlement. On April 15, 1940, the wife was granted a decree absolute of divorce. On her application for variation of the settlement it was submitted on behalf of the Public Trustee, as trustee of the settlement, that the settlement did not come within the ambit of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and so could not be varied :—

Held, that the substance and not the form of the settlement must be regarded; that the court must put itself in the position of the settlor and in effect take as recited the relevant facts, including the marriage and the issue of the marriage existing at the date of the settlement; that, in consequence, the settlement must be considered to have been made " because of " the marriage (test laid down by Hill J. in *Hargreaves* v. *Hargreaves* [1926] P. 42, 45, applied); and that, therefore, the settlement was a post-nuptial settlement within s. 192 of the Act of 1925, and so could be varied.

APPLICATION for variation of settlements.

The facts appear from the headnote. The registrar took the view that the settlement could be varied, and he made a report accordingly. The matter now came before the judge on an application to confirm the registrar's report.

William Latey for the wife.
Clifford Mortimer for the children.
Victor Williams for the husband.
Fawell for the Public Trustee.

Cur. adv. vult.

1942. Nov. 10. HENN COLLINS J. read the following judgment. On this application the objection was taken that the settlement of which a variation was sought was not a nuptial settlement within the meaning of s. 192 of the Judicature Act, 1925 (1). On behalf of the Public Trustee it was argued that the settlement is not within the section because it was not made "because of" the marriage in question, and bears no more specific relation to that particular marriage than would an ante-nuptial settlement which was not related to a marriage with any particular person. Against that it was contended, first, that, since the settlement was made, in point of time, after the marriage in question, it is a post-nuptial settlement within the description given by Greer L.J. in *Melvill* v. *Melvill and Woodward* (2), and, secondly and alternatively, that, since it confers benefits on the settlor's children, as such, and since there was, at the date of the settlement, a child of the marriage, it is a settlement which answers the narrower description propounded by Hill J. in *Hargreaves* v. *Hargreaves* (3), as being made "because of" the marriage. This (in *Melvill* v. *Melvill and Woodward* (2)) narrower description commended itself to Romer L.J. as preferable to the wider one. If I thought that Greer L.J. had really adopted the wider description as anything in the nature of a test, I should have found myself confronted by two conflicting criteria, but the tenour of his judgment shows

(1) By Supreme Court of Judicature (Consolidation) Act, 1925, s. 192: "The court may after "pronouncing a decree for divorce "or for nullity of marriage "enquire into the existence of "ante-nuptial or post-nuptial "settlements made on the parties "whose marriage is the subject "of the decree, and may make "such orders with reference to "the application of the whole "or any part of the property "settled either for the benefit "of the children of the marriage "or of the parties to the marriage, "as the court thinks fit, and the "court may exercise the powers "conferred by the sub-section "notwithstanding that there are "no children of the marriage."

(2) [1930] P. 159, 177.

(3) [1926] P. 42, 45.

1942

JOSS
v.
JOSS.

Henn Collins J.

that he was doing nothing of the kind, but was deciding the case on its own facts, without laying down any new principle.

I think, therefore, that the settlement in question, to come within the section, must answer the narrower test. It is not enough that it should have been made by a spouse after the marriage. It must also have been made "because of" the marriage. Having regard to the trend of the decided cases, I do not think that that phrase "because of" is meant to invite or require a search for a sole or a prime or an approximate cause or even a causa sine qua non. If that were necessary it is at least doubtful whether the settlement in *Melvill* v. *Melvill* (1) could have stood the test. What is really meant, I think, is that the particular marriage must be a fact of which a settlor takes account in framing the settlement. If the particular marriage is recited or referred to, it is patently a factor. Hence, a settlement made before marriage, but not in relation to or contemplation of the particular marriage, is not within the section, but a settlement is within it if from its recitals or substance it is apparent that it is related to a particular marriage. Similarly, in the case of a settlement made after marriage. If the marriage is recited or expressly referred to it is patently a factor, but if it is not recited or referred to it may still be a factor, and, since the marriage is an existing fact which the settlor must have had in mind, the absence of recital makes little difference. This, I think, is what Greer L.J. meant by the passage in his judgment in which he drew the distinction between a pre-nuptial and a post-nuptial settlement.

What material is there in the settlement now before me or in the circumstances in which the settlor was situated on which to found that inference? It is said that, in the words of Lord Hanworth M.R., in *Melvill* v. *Melvill* (1), the settlement "is "made by one of the parties to the then existing marriage "and in favour of the children of the marriage." The settlement in that case recited the marriage, the fact that the settlor was the wife of that marriage, and that there were children of that marriage, and it made those children, though not exclusively of others, beneficiaries, and those matters were apparent on the face of the deed. There are no such indications expressed on the face of this settlement, but that does not conclude the matter. It is the substance and not the form which must be regarded, and to construe the settlement

(1) [1930] P. 159, 174.

1942

Joss
v.
Joss.

Henn Collins J.

I must put myself in the position of the settlor, and take as, in effect, recited the relevant facts, including his then existing marriage and the existing issue of that marriage. If those facts had, in fact, been recited by this settlement, it would have been, I think, impossible to distinguish it from that in *Melvill* v. *Melvill* (1). Although not recited they must, in my judgment, be taken into account in determining the effect of the settlement, and if, when its effect is ascertained, it is found to be related to and to proceed on the footing of the then existing marriage, as distinguished from, though not exclusive of, any other marriage, I think it should be held to be within the section.

Solicitors for wife and children: *Dixon, Hunt & Tayler.*
Solicitors for husband and Public Trustee: *E. Bevir & Son.*
W. L.

ACWORTH *v.* ACWORTH.

C. A.

1942

Nov. 30.

Divorce—Maintenance—Needs of wife—Wife abroad—Impossibility of sending money out of United Kingdom—Maintenance of wife by friends—Suspension of maintenance order—Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 & 2 *Geo.* 6, *c.* 63), *s.* 14, *sub-s.* 1 (*b*).

After the wife had obtained a decree absolute for the dissolution of her marriage with the husband an order was made under s. 190, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, for the payment to her by the husband of monthly payments amounting to 500*l.* a year. Later, the wife went to the United States. Owing to the provisions of reg. 3 of the Defence (Finance) Regulations, 1939 (as amended), it was impossible for the money payable under the order to be sent to the United States, and before she was permitted to leave Great Britain she was called on to give undertakings of the most stringent kind not to receive any money from this country. The wife was being maintained by friends in the United States. On an application by the husband based on the ground that in these circumstances she had no need of the 500*l.* a year, the registrar suspended the order under s. 14, sub-s. 1 (*b*), of the Administration of Justice (Miscellaneous Provisions) Act, 1938. On appeal, Henn Collins J. discharged the registrar's order, and the husband appealed from that decision:—

Held, that maintenance included everything which a wife might in reason want to do with the income with which she was provided and could not be limited to her actual needs, and, therefore, the fact that she was being maintained by friends was not a ground for suspending the order,

C. A.
1942
ACWORTH
v.
ACWORTH.

APPEAL from Henn Collins J.

The facts appear in the headnote.

Harman K.C. and *Aiken Watson* for the husband. Owing to the operation of the Defence (Finance) Regulations, 1939 (as amended), it is impossible to send money to the United States so the wife cannot in fact be maintained by the 500*l.* It is, therefore, useless to pay it. To get permission to leave Great Britain she had to give an undertaking not to receive money from this country, and by so doing she must be taken to have renounced the order. In considering whether a maintenance order should be suspended the wife's needs are the criterion. In the present case she is being completely maintained by friends in the United States and so she has no need of the 500*l.* a year.

Holroyd Pearce for the wife. The ordinary needs of the wife, such as food, clothing and lodging, is not the sole matter to be considered on an application to suspend a maintenance order. The position of the parties, their mode of life and their social obligations must also be taken into account. A wife is entitled to such a sum as would be an adequate portion if she were a widow: *Gilbey* v. *Gilbey*, per Lord Merrivale P. (1). When an allowance is granted the wife has the same right to deal with it as has any other person with an income. The court will not pry into items of expenditure. In no reported case has there been a reduction of a maintenance order on account of a reduction in the wife's needs. [*Hulton* v. *Hulton* (2) was also cited.]

Harman K.C. replied.

SCOTT L.J. The first question which arises is whether the fact that the wife was being maintained by friends in the United States of itself constitutes a reason why the husband should be freed, even temporarily, from his obligation to pay maintenance. "Maintenance" is a very wide word, and, in my view, it should be read as covering everything which a wife may in reason want to do with the income which she enjoys. It includes much more than food, lodging, clothes, travelling, and so on. It includes, for instance, charity and making arrangements for the future, thus incurring various liabilities in her discretion, and it is wrong to limit it to any particular form of expenditure. The figure arrived at by the court in the first instance was not arrived at primarily on the

(1) [1927] P. 197, 201. (2) [1916] P. 57.

basis of her needs. It is not for the court, when making a maintenance order, to decide, by a close consideration of a wife's needs, how much she ought to spend. I do not say that the needs of a wife should be altogether disregarded, but I do say that that is not the primary consideration. In *Gilbey* v. *Gilbey*, Lord Merrivale P. said (1): "Where the "husband's whole income has been expended on the require- "ments of the matrimonial home, a third of the husband's "means may well be required for the wife's maintenance; "but where, beyond everything called for by such require- "ments in the most comprehensive view, the husband "possesses an ample fortune, of which he can dispose for "external purposes, the amount of his income affords no "definite guidance as to what sum is required for personal, "domestic, and social expenses, and what sum will supply to "his sometime wife the necessaries, comforts, and advantages "incidental to her station in life." He concludes with this question (2): "Would the proposed maintenance have been "an adequate portion if the petitioner had become a widow of "the respondent?" If that is the true view, it follows that the fact that certain elements of the cost of maintenance in the widest sense of the word were taken off the shoulders of the wife by the hospitality of hosts in the United States is no ground of itself for reducing the payment of a fixed sum of 500*l.* a year. Secondly, I am of opinion that the registrar also erred in not recognizing that the figures of the commitments incurred and to be discharged by the wife in this country, whether she was in this country or in America, were of themselves sufficient reason for leaving the 500*l.* maintenance order still operative. There is, therefore, no reason for altering the figure originally ordered. The learned judge was right and the appeal must be dismissed.

MacKinnon L.J. I agree.

Appeal dismissed.

Solicitors for the husband: *Ravenscroft, Woodward & Co.*
Solicitors for the wife: *Lewis & Lewis & Gisborne & Co.*

(1) [1927] P. 197, 200. (2) [1927] P. 197, 201.

W. L. L. B.

1942
Nov. 11, 12;
Dec. 10.

THE POMONA.

Shipping — Prize — Condemnation — Enemy vessel in British port — Under civil arrest before outbreak of war—Anticipatory embargo—Claim by enemy shipowners—Hearing—Hague Convention, No. VI., of 1907, *preamble, arts.* 1, 2.

On August 26, 1939, a German vessel lying in the West India Docks was arrested in an action in rem by the time-charterers of the vessel for breach of charterparty. On September 2 the military authorities sent a guard down to the docks with orders that, if the vessel was seen to be casting off, or if the safety of the dock was in any way endangered, she was to be boarded and taken over. Immediately after the declaration of war on September 3 the master and crew were taken into custody and the vessel was seized as prize. A writ in prize was subsequently issued claiming condemnation and the vessel was requisitioned by the Crown. The German owners entered an appearance to the writ and claimed that the vessel could only be detained and not confiscated.

The preamble to Hague Convention No. VI., of 1907, states that the contracting parties concluded it, "Wishing, in accordance " with modern practice, to protect as far as possible operations " undertaken in good faith and in process of being carried out before " the outbreak of hostilities " ; and art. 2 provides that a merchant ship which, owing to circumstances of force majeure, has been unable to leave the enemy port may not be confiscated but only detained. The British government, however, denounced this convention in 1925.

Held, that, in the absence of reciprocal agreement, there is no rule of international law whereby an enemy merchant ship found in the port of a belligerent at the outbreak of war is immune from condemnation, nor, if prevented from departing by force majeure, that she is entitled to days of grace ; that the stationing of the military guard on the dockside was a measure of precaution and did not amount to the imposition of an anticipatory embargo on the vessel (if such be still recognized in international law) ; and that, therefore, she was liable to condemnation.

Circumstances in which a claim by enemy shipowners that their ship was immune from capture heard.

ACTION for condemnation of ship.

The Procurator-General on behalf of the Crown, sought condemnation of the German motor vessel, *Pomona*. On August 25, 1939, the *Pomona*, which was under time charter to the Jamaica Banana Producers Association, Ld., was loading a cargo for the charterers at the West India Docks for the outward voyage to Jamaica. All German ships having been ordered by wireless to return to Germany at once,

1942
THE POMONA.

her master, purporting to act on behalf of the owners, gave notice cancelling the charterparty and demanded that the charterers should discharge the ship and arrange for her dispatch on the evening tide. The charterers refused to accept the cancellation and instituted proceedings in rem, and the *Pomona* was arrested on August 26. On September 2, on the orders of the G.O.C. London District, an officer and ten other ranks were sent to the dock with orders that, in the event of the ship preparing to cast off or if the safety of the dock was endangered, they were to board her and take her over. Immediately after the proclamation of war on September 3, the vessel was boarded by an officer and Port of London police and the master and crew were taken into custody. On September 14 a writ in prize claiming condemnation was issued, and on December 6 the German owners, who had already entered an appearance, claimed that the ship should merely be detained.

Sir Donald Somervell A.-G. and *H. L. Parker* for the Procurator-General. Apart from the Sixth Hague Convention, which the British government repudiated in 1925, a belligerent has a right to seize and condemn an enemy ship found in its ports at the outbreak of war: *The Marie Leonhardt* (1), confirmed in *The Blonde*, see the observation of Lord Sumner (2); and it makes no difference if the vessel happens to be under civil arrest at the time. Under the old law enemy ships in such circumstances could clearly be condemned, and although in more modern times days of grace came to be allowed, this was not as of right. Indeed, if any such "rule" existed the Sixth Hague Convention took away the right, because art. 1 merely said that it is "desirable" that a merchant ship which is in an enemy port at the outbreak of war should be allowed to depart. Art. 2, which provided that a merchant ship, which, owing to force majeure, may have been unable or not allowed to leave "may not be confiscated," was new and not in accordance with the existing international law (3). There is no case which (apart from reciprocal agreement) suggests that a vessel which, for some reason beyond

(1) [1921] P. 1; 3 Br. & Col. P. C. 761.

(2) [1922] 1 A. C. 313, 326; 3 Br. & Col. P. C. 1031, 1041.

(3) By Hague Convention, No. VI.: Preamble; "Anxious to "ensure the security of inter- "national commerce against the "surprises of war and wishing, in "accordance with modern prac- "tice, to protect as far as possible "operations undertaken in good

1942

THE POMONA.

the control of her owners, cannot get away before the outbreak of war may only be detained. The sending of the military guard to the dock was merely a measure of precaution and raises no question of anticipatory embargo: see, as to embargo, *The Boedes Lust* (1), and Rothery's Prize Droits, p. 69.

Le Quesne K.C. and *Colombos* for the claimants. From the middle of the last century the tendency has been more and more to exempt from confiscation enemy private property found in the port of a belligerent on the outbreak of war. The granting of days of grace in which the ship could depart has long been part of modern international law: see the preamble to the Sixth Hague Convention. Arts. 1 and 2 of that convention are merely declaratory of the law, and, as regards a vessel detained in port by force majeure, art. 2 is obligatory: "The belligerent may 'only detain it.'" The present argument was not addressed to the court in *The Marie Leonhardt* (2) and the observations of Lord Sumner in *The Blonde* (3) are obiter. The United States construed the American Proclamation as regards days of grace in the Spanish-American War most liberally: see *The Buena Ventura* (4), and it appears from the translation of the German Prize Ordinance, 1939, that Germany was still adhering to the provisions of the Sixth Hague Convention "relating to treat-"ment of enemy merchantmen at the outbreak of hostilities": see art. 18. If the *Pomona* was not entitled to days of grace, the presence of the military guard constituted an anticipatory embargo by the government. The use by the Crown of the

"faith and in process of being "carried out before the outbreak "of hostilities; the high con-"tracting parties have resolved "to conclude a convention to this "effect . . . ."

By art. 1: "When a merchant-"ship of one of the belligerent "Powers is at the commencement "of hostilities in an enemy port, "it is desirable that it should be "allowed to depart freely, either "immediately, or after a sufficient "term of grace, and to proceed "direct, after being furnished "with a passport, to its port of "destination or such other port "as shall be named for it . . . ."

By art. 2: "A merchant-ship "which, owing to circumstances "of force majeure, may have been "unable to leave the enemy port "during the period contemplated "in the preceding article, or which "may not have been allowed to "leave, may not be confiscated. "The belligerent may only detain "it, under an obligation of re-"storing it after the war, without "indemnity, or he may requisition "it on condition of paying an "indemnity."

(1) (1804) 5 C. Rob. 233, 246.

(2) [1921] P. 1; 3 Br. & Col. P. C. 761.

(3) [1922] 1 A. C. 313, 326; 3 Br. & Col. P. C. 1031, 1041.

(4) (1899) 175 U. S. 384.

civil arrest was not justified, and anticipatory embargo should be regarded as obsolete: see Twiss' Law of Nations, vol. ii., pp. 21, 22, and Hall's International Law, 8th ed., p. 442. It superseded the civil arrest and was illegally imposed. [Reference was also made (by the President) to *The Bathori* (1), and the following text books on international law were cited: Lawrence, 7th ed., p. 315; Oppenheim, 6th ed., vol. ii., p. 267; Pitt Cobbett: Leading Cases, 5th ed., vol. ii., pp. 217, 218; Westlake, 2nd ed., Part 2, pp. 42, 43; Pearce Higgins' Hague Peace Conferences, p. 295; Rothery's Prize Droits, pp. 69, 127, 130, and the cases of *Les Trois Amis* and *The Minerva* there mentioned; the British Year Book of International Law, 1922-1923, pp. 55, 75, and 1930, pp. 216, 217, and the Annual Digest of Public International Law Cases, 1929-1930. p. 514.]

Sir Donald Somervell A.-G. replied.

Cur. adv. vult.

1942. Dec. 10. LORD MERRIMAN, P., read a judgment in which, dealing with the status of the claimants, his Lordship said that although they were not able to rely on any international agreement, the Attorney-General raised no objection to their being heard, and submitted the matter to the discretion of the court. He (his Lordship) had come to the conclusion that the circumstances on which the claimants relied as giving the vessel immunity from capture, although falling short of any treaty obligation, justified him in hearing them on their claim. His Lordship continued: No claim is made for immediate release. Nor, indeed, could any such claim have been made, since on November 2, 1939, the Crown obtained an order for the requisition of this vessel, and the owners, who were represented on that occasion, did not oppose the making of the order. Mr. Le Quesne, therefore, confined himself to arguing that the circumstances were such as to give immunity from capture with the implication that, in due course, the vessel, or her value, would be restored to the owners.

The question of immunity from confiscation of enemy merchant ships in a belligerent port at the outbreak of war, and the practical mitigation of the rigours of international law by the grant of days of grace within which they might depart freely, are dealt with in the preamble and in arts. 1 and 2 of the Hague Convention, No. VI. (2). But this convention

(1) [1933] P. 22. (2) See note (3), ante p. 25.

1942

THE POMONA.

The President.

was denounced by this country on November 14, 1925, and it is not open, therefore, to the claimants to rely on its provisions. Mr. Le Quesne, however, argued that they were merely declaratory of principles of international law already recognized before the last war. Accordingly, he maintained, first, that the seizure, in so far as it was directed to confiscation, was illegal, and, secondly, that as the *Pomona* was in fact prevented from departing by force majeure she was entitled to days of grace for her departure and the Crown was not entitled to take advantage of an arrest at the instance of a private litigant to deny her this right, since, in accordance with the ordinary procedure of the Admiralty Court, the vessel would normally be released as soon as bail was provided to meet the claim. The two questions are not the same, since the question of immunity from confiscation is independent of the fact of arrest, while it would obviously be more difficult to apply to the case of a vessel already in arrest a provision for granting days of grace which might, in any case, have expired before she could be freed from arrest. But, as either point, if established, is sufficient for the claimants' case, it will be convenient to take them together. It is conceded that, unless the principles contended for had become embodied in international law before the last war, there has been no subsequent development of that law of which the claimants could avail themselves.

In support of his argument Mr. Le Quesne cited extracts from writers of acknowledged authority on international law. I must not be taken to be throwing any doubt on the assistance which a Prize Court may derive from such sources as to the state of international law with regard to any question which has not been the subject of judicial decision, if I suggest that the effect of these citations may not unfairly be summarized by saying that those passages which assist the claimants and are of earlier date than the two decisions to which I am about to refer formed the basis of arguments which were rejected expressly or by implication in those cases, while those of later date correctly record the effect of the two decisions and do not assist the claimants. I do not, therefore, propose to examine them in detail.

The two decisions to which I refer are *The Marie Leonhardt* (1) and *The Blonde* (2). In *The Marie Leonhardt* (1), Lord

(1) [1921] P. 1; 3 Br. & Col. P. C. 761.

(2) [1922] 1 A. C. 313, 328; 3 Br. & Col. P. C. 1031, 1043.

1942

THE POMONA.

The President.

Merrivale held that, in the absence of a reciprocal agreement and apart from the provisions of the Sixth Hague Convention, there was no rule of international law whereby an enemy merchant ship found in the port of a belligerent at the outbreak of war is entitled to depart freely from that port either immediately or after a reasonable number of days of grace, and that the ship is subject to detention and confiscation. It may be that in process of arriving at this decision Lord Merrivale, as appears from the decision in *The Blonde* (1) underrated the obligatory character of arts. 1 and 2 of the convention, the combined effect of which was stated in *The Blonde* (1) to be: "Ships which find themselves at the out-"break of war in an enemy port shall in no case be condemned, "if they are not allowed to leave, or if they unavoidably "overstay their days of grace, but it would be better that they "should always be allowed to leave, with or without days of "grace." Lord Sumner, who delivered the opinion of the Privy Council, added that in effect, while art. 1 is only optional, art. 2 is obligatory, and said that their Lordships rejected a construction which made the prohibition of confiscation depend on a prior election to do what art. 1 desiderates, but does not require. Accordingly, Mr. Le Quesne's argument may most forcibly be stated as follows: It was decided in *The Blonde* (2) that the combined effect of arts. 1 and 2 of the convention is obligatory; the preamble says that the convention expresses the anxiety of the contracting parties to ensure the security of international commerce against the surprises of war, and their desire "in accordance with modern practice" to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities. From this it appears to follow that arts. 1 and 2 are merely declaratory of existing international law. It seems to me that there are two answers to this argument. First, the natural construction of the reference to modern practice in the preamble is to treat it as referring to the tendency, which undoubtedly occurred in the latter half of the nineteenth century, for belligerents to make concessions of uncertain and variable extent outside the recognized law, for which the relevant articles substituted an agreement binding on the contracting parties, to the effect set out in the passage already quoted. Secondly, to hold otherwise would be

(1) [1922] 1 A. C. 313, 328; 3 Br. & Col. P. C. 1031, 1043.

(2) [1922] 1 A. C. 313, 326; 3 Br. & Col. P. C. 1031, 1041.

1942

THE POMONA.

The President.

to ignore completely the passage in Lord Sumner's opinion which reads as follows: "Turning to arts. 1 and 2 of the sixth "Hague Convention, it is important to remember that, before "its date, and since its date whenever it is not in force, the "law of nations permitted and entitled a belligerent to make "prize of an enemy merchantman found within his ports at "the outbreak of war (*Lindo* v. *Rodney*) (1)). It is true that "in several instances during the nineteenth century belligerents "mitigated the rigour of the rule and granted days of grace "for the free departure of such vessels. The practice was "certainly modern, but it was neither uniform nor universal, "and on each occasion it rested with the belligerent to elect "whether the rule recognized by the law of nations should "be mitigated or not. It is not surprising that the negotiators "of 1907 got no further than agreeing that permission to "depart freely, within a time to be fixed by the Power entitled "to capture, was a thing desirable indeed, but not obligatory." This passage is in complete accord with the actual decision in *The Marie Leonhardt* (2). Mr. Le Quesne argues that it was obiter. On the contrary, it seems to me to be the key to the whole judgment; it was precisely because it was recognized that international law was settled in this sense that their Lordships based their advice to His Majesty solely on the terms of what they held to be a binding agreement. The form in which their advice is expressed is quite inconsistent with a state of international law such as that for which Mr. Le Quesne contends, or even with there being any doubt about the law. Even if, as is not the case, I thought otherwise, I should consider myself bound by those decisions to reject the claimants' contention.

Assuming, however, that this principle of international law is established where the belligerent power, in whose port a vessel was found at the outbreak of war, had itself imposed no restriction on her movements, Mr. Le Quesne argued that different considerations would apply if that power had imposed an anticipatory embargo on the vessel before the outbreak of war, with the object of effecting seizure in the event of war. This, he argued, had been done in this case, and had been done in purported exercise of a right now obsolete in international law, and, that being so, the embargo must be taken to have superseded the civil arrest with the consequence that, as it

(1) (1783) 2 Doug. 612 *n.*

(2) [1921] P. 1; 3 Br. & Col. P. C. 761.

1942

THE POMONA.

The President.

was illegally imposed, the vessel should be treated as having been free to depart before war broke out, and the Attorney-General should not be heard to argue that the civil arrest was still an effective cause of her detention. The question is whether the facts raise any question of anticipatory embargo. It is conceded that embargo is usually the subject of a general proclamation. I will assume, however, for the purposes of the argument, that an individual ship may be the subject of embargo. Even so, I do not think that there is any evidence that anything of the sort was imposed in this case. The armed guard was ordered to stand by alongside, not with the object of rendering a ship, otherwise free to depart, available for seizure on the outbreak of war, but because there was reasonable ground for apprehension that those in charge of this particular ship, which, to the knowledge of the military authorities, was by law bound to remain until her civil arrest was lawfully terminated, might commit acts of sabotage, or might become involved in a breach of the peace with the dock workers among whom feeling was running high, or even by making an attempt to break the arrest. There is nothing in the provision of a guard in these circumstances which can fairly be called an embargo, and, therefore, as anything I might say on the subject would be obiter dictum, I accept the Attorney-General's invitation to postpone to a more suitable occasion consideration of the interesting questions whether anticipatory embargo is still recognized in international law, and, if so, whether it would attach to a ship already lawfully detained on other grounds.

For these reasons I am of opinion that the *Pomona* is liable to condemnation as good and lawful prize, and I give judgment accordingly.

[The question of costs was then argued, and the President said that as it appeared to be somewhat in the nature of a test case, the claimants would not be ordered to pay the Crown's costs.]

Solicitor for Procurator-General: *Treasury Solicitor.*
Solicitors for the claimants: *Bentleys, Stokes & Lowless.*

E. C. M. T.

C. A.

1942

Dec. 15, 16, 17.

THE OROPESA.

Estoppel—Maintenance of action—Previous action between same parties—Different cause of action—Collision at sea—Claim by administrators for loss of life—Previous claim as personal representatives for loss of effects—Negligence—Damage—Remoteness—Novus actus interveniens.

Two steam vessels, the *M. R.* and the *O.*, came into collision. Although the *M. R.* was badly damaged her master thought that she could be salved. He had sent fifty of his crew in two of his boats to the *O.*, and, about an hour and a half after the collision, he decided himself to go to the *O.* and confer with her master on the measures to be taken. The master launched another lifeboat in which he embarked with sixteen men, including the sixth engineer. The weather was rough and it got worse, and before the boat could reach the *O.* it capsized and nine of the men in it, including the sixth engineer, were drowned. The *M. R.* subsequently sank. In an action by the owners of the *M. R.* against the owners of the *O.* the parents of the deceased sixth engineer were joined as plaintiffs as his personal representatives suing for his lost effects. The court found the *M. R.* four-fifths to blame and the *O.* one-fifth, and, accordingly, the parents of the sixth engineer were held to be entitled to recover against the owners of the *O.* in respect of the loss of his effects. The parents now brought an action against the owners of the *O.* under the Law Reform (Miscellaneous Provisions) Act, 1934, as administrators of the estate, claiming damages in respect of the loss of expectation of their son's life, and also, in their own right, damages as part-dependants under the Fatal Accidents Acts :—

Held, (i.) the master of the *M. R.* had acted reasonably in the emergency and that the death was not the result of a novus actus interveniens, but was directly caused by the collision ; (ii.) that the cause of action under the Law Reform (Miscellaneous Provisions) Act was different from that on which the plaintiffs' claim in the collision action had been founded, and that they were entitled to damages under that Act as well as under the Fatal Accidents Acts.

Decision of Langton J. [1942] P. 140, affirmed.

APPEAL from a decision of Langton J. in an action for damages in respect of loss of life.

The plaintiffs were Edwin and Alice Lord, the parents of Arthur Lord, deceased, sixth engineer on board the steamship *Manchester Regiment*. The defendants were the Pacific Steam Navigation Co., owners of the steamship *Oropesa*. The plaintiffs' action arose out of a collision between the *Manchester Regiment* and the *Oropesa* off the coast of Nova Scotia on the early morning of December 4, 1939. On October 3, 1940,

the court found the *Manchester Regiment* four-fifths to blame and the *Oropesa* one-fifth. In that action the present plaintiffs, as personal representatives of the deceased, were joined as plaintiffs and recovered damages against the defendants in respect of the loss of personal effects of the deceased. They now claimed damages under the Law Reform (Miscellaneous Provisions) Act, 1934, as administrators of their son's estate for the loss of expectation of his life, and also, on their own behalf, as part-dependants under the Fatal Accidents Acts.

It was quickly apparent after the collision that the *Manchester Regiment* was seriously damaged. Steam was kept to the last possible moment, but the engine-room filled quickly and the ship was without lights or steam within thirty minutes. Meanwhile, signals were made by lamp to the *Oropesa* saying that the *Manchester Regiment* was badly holed and asking for the *Oropesa* to stand by. The *Manchester Regiment*, in her master's view, was an exceptionally strong ship, and he came to the conclusion that when the engine-room and stokehold had filled to the outside sea level she would still float on her bulkheads. Accordingly, having first sent to the *Oropesa* fifty of his ship's complement of seventy-four in the two port lifeboats, he decided, about an hour and twenty minutes after the collision, to go personally on board the *Oropesa* and there concert with her master all possible measures for the salvage of the *Manchester Regiment*. The *Oropesa* was then over a mile away and drifting. The master of the *Manchester Regiment* embarked in the starboard lifeboat with sixteen members of the crew, including the deceased. The weather conditions were rough and a cross swell, running against the sea, became worse. After thirty minutes the boat capsized and only eight of the seventeen who had been in it succeeded in clambering on to the up-turned keel. They were rescued at dawn by a boat from the *Oropesa*, the deceased not being among those who were saved. The *Oropesa* had herself received serious damage in the collision, and it was judged unwise for her to stand by the *Manchester Regiment*. The seven remaining members of the crew left on board the *Manchester Regiment* were, therefore, taken on board the *Oropesa* and that vessel returned to Nova Scotia. The *Manchester Regiment* was never sighted again.

Langton J. held that the plaintiffs were entitled to succeed because (1.) the deceased lost his life as a direct consequence of the collision and not of a novus actus interveniens, and (2.),

C. A. 1942 THE OROPESA.

applying the decision in *Brunsden* v. *Humphrey* (1), the plaintiffs were not estopped from maintaining the present action by reason of the fact that in previous proceedings they had put forward a claim in respect of the loss of the effects of the deceased. He assessed the damages at 200*l.* under the Law Reform (Miscellaneous Provisions) Act, 1934, and 50*l.* under the Fatal Accidents Acts. The defendants appealed.

Sellers K.C. and *Owen Bateson* for the defendants. So far as the claim under the Law Reform (Miscellaneous Provisions) Act, 1934, is concerned, there is an estoppel, for the claim for loss of effects put forward in the collision action was by the same plaintiffs in respect of the same estate and against the same defendants. It is admitted that *Brunsden* v. *Humphrey* (1) is against this contention, but that case is open to review in the House of Lords. On the main issue, assuming that the collision was partly caused by the *Oropesa's* negligence, that negligence was not the direct cause of the death of the deceased: *The Paludina* (2), *The San Onofre* (3). It was the independent decision of the master of the *Manchester Regiment*, which he was not compelled to take, that resulted in the order to the deceased to get into the boat. The deceased was a mere spectator. He had neither been injured, nor had he received any shock in the collision. A new set of circumstances arose after the collision when the master elected to put off to the *Oropesa*, when there was no necessity for him to do so. The chain of causation was broken then. [Reference was also made to *The City of Lincoln* (4); *Weld-Blundell* v. *Stephens* (5); *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (6); *Commonwealth Shipping Representative* v. *P. & O. Branch Service* (7); *The Heranger* (8); and Winfield's Torts, p. 84.]

Sir Robert Aske K.C. and *E. W. Brightman* for the plaintiffs. The plaintiffs are not estopped from maintaining these proceedings. There was no novus actus interveniens. It was the duty of the master to minimize the loss and make every effort to save his ship: see s. 220 of the Merchant Shipping Act, 1894. For the chain of causation to be broken, the subsequent conduct must be unreasonable: see *Canadian*

(1) (1884) 14 Q. B. D. 141.
(2) [1927] A. C. 16.
(3) [1922] P. 243.
(4) (1889) 15 P. D. 15.
(5) [1920] A. C. 956.
(6) [1918] A. C. 350.
(7) [1923] A. C. 191.
(8) [1939] A. C. 94, 104.

Pacific Railway Co. v. *Kelvin Shipping Co., Ld.* (1) and *The City of Lincoln* (2). The *Oropesa* owed a duty, not only to the *Manchester Regiment*, but also to her officers and crew to navigate with due care. The failure to do so placed everyone on the *Manchester Regiment* in imminent danger and to avert possible further damage and loss the master decided to go on board the *Oropesa*. [Reference was also made to *The Annie* (3), *The Blow Boat* (4), and, on the question of estoppel, *British and French Trust Corporation* v. *New Brunswick Railway Co.* (5) and *Hoystead* v. *Commissioner of Taxation* (6).]

Bateson replied.

LORD WRIGHT [after stating the facts] It has been argued, as regards the claim for loss of expectation of life (which is a claim on behalf of the estate of the deceased man), that there is an estoppel because in the collision action brought by the owners of the *Manchester Regiment*, the plaintiffs, as personal representatives of the deceased, were joined as plaintiffs and sued for the lost effects of the deceased—a course which in practice is always adopted. The answer to the argument which has been advanced is clear. Whether or not it is logical, this is an exception to the rule that there cannot be two actions in respect of the same casualty. The reason is that, although the claim is in respect of the same negligence, the damages claimed are in respect of the infringement of different rights. That being so, the fact that the plaintiffs brought an action in which they recovered damages for injury to the one right, namely, the injury to chattels, does not prevent them bringing an action for an injury to an entirely different right, that is to say, an injury to the person, including loss of life. That was established by the judgment of the majority of the Court of Appeal in *Brunsden* v. *Humphrey* (7), and I may refer particularly to the illuminating judgment of Bowen L.J. in that case. That issue, therefore, may be disregarded.

On the main question, the plaintiffs sue on the basis that the owners of the *Oropesa* owed a duty, not only to the owners of the *Manchester Regiment*, but also to her officers and crew, to navigate with care and skill so as not to injure them.

(1) (1927) 138 L. T. 369.
(2) 15 P. D. 15.
(3) [1909] P. 176.
(4) [1912] P. 217, 221.
(5) (1937) 43 Com. Cas. 110, 116.
(6) [1926] A. C. 155, 165.
(7) 14 Q. B. D. 141.

C. A. 1942

THE OROPESA.

Lord Wright.

Negligent navigation would obviously be a breach of that duty, and, therefore, it is said there was here a breach of duty towards the deceased. The defendants deny liability on the ground that there was no legal connexion between the breach of duty and the death of the deceased. Certain well-known formulæ are invoked, such as that the chain of causation was broken and that there was a novus actus interveniens. These phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one can be treated as flowing directly from the other. Cases have been cited which show great difference of opinion on the true answer in the various circumstances to the question whether the damage was direct or too remote. I find it very difficult to formulate any precise and all-embracing rule. I do not think that the authorities which have been cited succeed in settling that difficulty. It may be said that in dealing with the law of negligence it is possible to state general propositions, but when you come to apply those principles to determine whether there has been actionable negligence in any particular case, you must deal with the case on its facts.

What were the facts here? The master of the *Manchester Regiment* was faced with a very difficult proposition. His ship was helpless, without any means of propulsion or of working any of her important auxiliary apparatus, a dead lump in the water, and he had only the saving thought that she might go on floating so long as her bulkheads did not give way. He had great faith in his ship, but he realized that there was a heavy sea, with a heavy gale blowing and that he was in a very perilous plight. As Sir Robert Aske pointed out in his argument, the captain of a ship is guilty of a misdemeanour under s. 220 of the Merchant Shipping Act, 1894, if he "refuses or omits to do any lawful "act proper and requisite to be done by him for preserving "his ship from immediate loss, destruction or serious danger, "or for preserving any person belonging to or on board "ship from immediate danger to life or limb." In those circumstances the master decided to go to the *Oropesa* where, no doubt, he thought he would find valuable help and advice. Nobody suggests that he was acting unreasonably or improperly in doing so, or, indeed, that he was doing anything but his duty. Nor can anyone say that the deceased

acted unreasonably in getting into the boat. If he had not obeyed the lawful orders of his captain, he would have committed a criminal offence under s. 225, sub-s. 1 (*b*), of the Merchant Shipping Act, 1894. If, therefore, the test is whether what was done was reasonable, there can be no question that the actions of both the master and the deceased were reasonable. Whether the master took exactly the right course is another matter. He may have been guilty of an error of judgment, but, as I read the authorities, that would not affect the question whether the action he took and its consequences flowed directly from the negligence of the *Oropesa*. I am not sure that Mr. Sellers does not agree with that view, anyhow to some extent, but he also argued that the deceased was merely a spectator of the collision. He received no personal injury nor shock, and there was no need for special steps to be taken on his behalf in the emergency. That being so, in obeying the master's orders and getting into the boat, he was merely doing a voluntary act which was in no legal sense associated or connected with the negligence of the *Oropesa*. As for the master, Mr. Sellers argued that what he did had no legal connexion with the casualty. In my view, that is not a correct reading of the position. Having regard to the situation of the *Manchester Regiment* and those on board her, I think that the hand of the casualty lay heavily on her and that the conduct both of the master and of the deceased was directly caused by and flowed from it. There was an unbroken sequence of cause and effect between the negligence which caused the *Oropesa* to collide with the *Manchester Regiment*, and their action, which was dictated by the exigencies of the position. It cannot be severed from the circumstances affecting both ships. To that must be joined the duty which they were under in their positions as captain and sixth engineer.

There are some propositions which are beyond question in connexion with this class of case. One is that human action does not per se sever the connected sequence of acts. The mere fact that human action intervenes does not prevent the sufferer from saying that injury which is due to that human action as one of the elements in the sequence is recoverable from the original wrongdoer. *The City of Lincoln* (1) is a useful case. It is short and the judges of the Court of Appeal were all agreed so we do not get the complications which are present in some of the cases in the House

C. A.
1942
THE OROPESA.
Lord Wright.

of Lords on this point. In *The City of Lincoln* (1) the question was whether the injury was directly caused by the casualty. On the point of what was meant by "the ordinary course of "things," Lindley L.J. said (2): "Sir Walter Phillimore has "asked us to exclude from it all human conduct. I can do "nothing of the kind. I take it that reasonable human "conduct"—I stress that expression—"is part of the ordinary "course of things. So far as I can see my way to any definite "proposition I should say that the ordinary course of things "does not exclude all human conduct, but includes at least "the reasonable conduct of those who have sustained the "damage, and who are seeking to save further loss." Mr. Sellers said that those words must not be pressed too hard, but you must look at the facts. The facts were that there had been a collision between a steamer and a barque, and the steamer was held alone to blame. "The steering compass, "charts, log and log glass of the barque were lost through "the collision," the headnote states. "The captain of the "barque made for a port of safety, navigating his ship by a "compass which he found on board. The barque, while on "her way, without any negligence on the part of the captain or "crew, and owing to the loss of the requisites for navigation "above mentioned, grounded, and was necessarily abandoned." It was held by the Court of Appeal that "the grounding of "the barque was a natural and reasonable consequence of the "collision, and that the owners of the steamer were liable for "the damages caused thereby." In principle, that case is not different from the present. The captain, being placed in a difficulty, went on navigating the ship. He thought that that was the reasonable course to adopt, and it was held to be reasonable in the emergency. The plaintiffs thus recovered, although there was a long interval, both in time and distance, between the collision and the physical grounding of the vessel. If the vessel had remained where she was, she might have been picked up or many other things might have happened. She might still have become a total wreck, but not a total wreck in the way in which the event happened in fact, but there it was held, notwithstanding the human action, that the grounding was a natural and reasonable consequence of the collision. In *Summers* v. *Salford Corporation* (3), a woman cleaning a window was injured because the sash cord broke. That is far removed from the facts with which we have to deal

(1) 15 P. D. 15. (2) Ibid. 18. (3) [1942] W. N. 224.

here, but it involves the same principle. Assuming, as was held in that case, that there was a breach of duty to her, the mere fact that no harm would have happened to her if she had not been cleaning the window was immaterial because she was doing something which was reasonable and in the ordinary course of events. If the master and the deceased in the present case had done something which was outside the exigencies of the emergency, whether from miscalculation or from error, the plaintiffs would be debarred from saying that a new cause had not intervened. The question is not whether there was new negligence, but whether there was a new cause. I think that is what Lord Sumner emphasized in *The Paludina* (1). To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic. I doubt whether the law can be stated more precisely than that. Lord Haldane gave a fuller description in *Canadian Pacific Ry. Co.* v. *Kelvin Shipping Co., Ld.* (2), where the whole of the ultimate damage was due to a handling of the vessel after the collision. Lord Haldane said: "I therefore turn at once to the crucial question "in the case, was there fault in those responsible for the "ship in reference to the use of her engines when she was "on the north bank? Now this is a question of evidence, "and in weighing the evidence in order to draw the proper "inferences, there are certain principles which have to be kept "steadily in view. When a collision takes place by the fault of "the defending ship in an action for damages, the damage is "recoverable if it is the natural and reasonable result of the "negligent act, and it will assume this character if it can be "shown to be such a consequence as in the ordinary course of "things would flow from the situation which the offending "ship had created. Further, what those in charge of the "injured ship do to save it, may be mistaken, but if they do "whatever they do reasonably, although unsuccessfully, "their mistaken judgment may be a natural consequence for "which the offending ship is responsible, just as much as is "any physical occurrence. Reasonable human conduct is "part of the ordinary course of things which extends to the "reasonable conduct of those who have sustained the damage "and who are seeking to save further loss." He takes that final

(1) [1927] A. C. 16. (2) 138 L. T. 369, 370.

C. A. 1942 — THE OROPESA. — Lord Wright.

proposition from *The City of Lincoln* (1). I think that is an important statement of principle—"if they do whatever they "do reasonably, although unsuccessfully, their mistaken "judgment may be a natural consequence for which the "offending ship is responsible." Here it may be said that, even if the master of the *Manchester Regiment* was not doing quite the right thing, his mistake might be regarded as the natural consequence of the emergency in which he was placed by the negligence of the *Oropesa*. There was a difference of opinion in *Canadian Pacific Ry. Co.* v. *Kelvin Shipping Co., Ld.* (2) on the final issue of fact. There was again a difference of opinion in *The Paludina* (3), but I should like to quote a few words of Lord Sumner: "Cause and consequence in such a "matter do not depend on the question whether the first "action, which intervenes, is excusable or not, but on the "question whether it is new and independent or not." There the master of the *Singleton Abbey* had not stopped his engines at a particular moment, and that resulted in trouble with the *Paludina* and the *Sara*. It was held that there had been a miscalculation which broke the chain of causation. That, again, was a decision on the facts. It does not take the matter any further, except, possibly, by way of comparison. The statement of the principles applicable by the majority of their Lordships does not in any way contradict what I have said. A mere voluntary act would clearly cause a breaking in the sequence of cause and effect as, for instance, in *The Amerika* (4), one of the claims made by the Admiralty by way of damages for loss due to the collision was that they had paid bounties to relatives of members of the ship's crew who had lost their lives. It was held that those payments were purely voluntary. That is an extreme, but obvious, illustration of a loss resulting from a collision which did not impose any legal liability. It was a loss incurred by purely ultroneous conduct.

The real difficulty in the present case is the application of the principle, which is a question of fact. I agree entirely with Langton J. in the way in which he has dealt with the question. I am not prepared to say in all the circumstances that the fact that the deceased's death was due to his leaving the ship in the lifeboat and to the unexpected capsizing of that boat prevented his death being a direct consequence of the casualty. It was a risk, no doubt, but a boat would not

(1) 15 P. D. 15.
(2) 138 L. T. 369, 370.
(3) [1927] A. C. 16, 28.
(4) [1917] A. C. 38.

generally capsize in those circumstances. In my opinion, the appeal should be dismissed.

C. A. 1942

THE OROPESA.

SCOTT L.J. I agree. We have been advised, as Langton J. was advised, that the position throughout in these happenings was one of critical danger to all those on board the *Manchester Regiment*. I am satisfied that the action taken by the master to save the lives of those for whom he was responsible was reasonable, and, therefore, that there was no break in the chain of causation. I agree entirely with the judgment which has just been delivered.

MACKINNON L.J. I agree.

Appeal dismissed.

Solicitors for defendants: *Middleton, Lewis & Clarke, for Batesons & Co., Liverpool.*

Solicitors for plaintiffs: *Gibson & Weldon, for John Whittle, Robinson & Bailey, Manchester.*

E. C. M. T.

Distinguished. HOPES *v.* HOPES. [1949] P. 227

WILKES *v.* WILKES.

1942 *Nov.* 3.

Divorce—Desertion—Parties living under same roof for part of statutory period, but leading separate lives—Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2 (*b*).

For more than a year preceding a husband's actual departure from his wife (which took place in June, 1938, two years before the date of the petition) the parties were living under the same roof, but during the whole of that time they had no common life. The husband, after saying to his wife in March, 1937: "This is "the end," never slept with her again and refused to share her sitting room or to have meals with her. Except for the facts that the wife paid the instalments due upon the mortgage of the house, which was in the husband's name, and that the husband from time to time took food from the wife's store and ate it, the lives of husband and wife were separate. The wife's attempts at reconciliation were at all times refused:—

Held, that the common home had been put an end to by the husband more than a year before he left the house and that the wife's case for desertion was proved.

Smith v. *Smith* [1940] P. 49 followed.

Littlewood v. *Littlewood* [1943] P. 11 distinguished.

1942

WILKES v. WILKES.

WIFE'S petition for divorce.

The wife, Silvey Agnes Robinson Wilkes, prayed for a decree of divorce from her husband, Arthur Charles Robinson Wilkes, on the ground of desertion for three years and upwards immediately preceding the date (June 29, 1940) of the presentation of the petition. The petition was not defended. The facts are set out in the headnote.

O'Malley for the petitioner.

HODSON J. The question which I have to determine is whether the husband has been guilty of desertion although for over a year preceding his physical departure he and his wife were living under the same roof. In *Jackson* v. *Jackson* (1) Hill J. pointed out that there may be desertion although the husband continues to live under the same roof as the wife, but the facts must be very strong. They must show that the husband actually caused the wife, not only to sleep apart from him, but also to live apart from him against her will. He referred to *Diver* v. *Diver* (2), where the question was whether the separation began a few months before the husband left the house. It appeared that, not only did he insist on occupying a separate room, but also he never spoke to his wife, and, if the wife spoke to him, he never answered her. When she asked why she was being so treated he knocked her down. In the circumstances I think that the present case falls on the same side of the line as *Smith* v. *Smith* (3), rather than on the other side of the line on which falls *Littlewood* v. *Littlewood* (4). I find that the common home had been put an end to by the husband in March, 1937. At that moment the marriage had come to an end, even although he did not actually leave the house until over a year later. The wife, therefore, has made out a case of desertion.

Decree nisi.

Solicitors for petitioner: *Lionel Lazarus & Leighton.*

(1) [1924] P. 19, 26.
(2) Unreported.
(3) [1940] P. 49.
(4) Ante p. 11.

N. N.

ROBINSON *v.* ROBINSON.

1943
Jan. 19.

Divorce—Maintenance—"Conduct of the parties"—Undefended suit for divorce—Charge of adultery against wife petitioner first alleged on application for maintenance—Res judicata—Public policy—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *and* 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-s.* 1.

A wife, having been granted a decree of divorce on her undefended petition, applied for maintenance, and the husband thereupon sought to impugn her conduct by alleging adultery against her. On behalf of the wife this plea was traversed on the ground that he had not filed the charges in answer to the petition:—

Held, the issue was not res judicata in the strict sense so as to exclude the application of the principle that, in assessing maintenance, it was essential that the court should have before it all relevant evidence of the conduct of the parties before and after marriage, but nevertheless it was against public policy to allow the husband to raise the allegations in the maintenance proceedings to free himself from his liability to support his wife when, in the divorce suit, he had refrained from using information which he had or which but for his carelessness might have had.

SUMMONS adjourned into court.

On December 17, 1941, the wife, Olive Cloy Fothergill Robinson, was granted a decree nisi for the dissolution of her marriage on the ground of the adultery of her husband who did not defend the suit. The wife subsequently applied for maintenance under s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925. At the hearing of the application allegations of adultery on the part of the wife were raised by the husband as being "conduct" by her which affected the amount of maintenance to be ordered. It was agreed that, although at the trial of the suit the husband did not know the material on which he now founded his allegations, he could have ascertained it. On November 17, 1942, the husband took out this summons calling on the wife to show cause (inter alia) why directions should not be given for the trial of the issue of adultery which he had raised. The wife denied the charges. The summons was adjourned by the judge into court for argument.

Fairweather for the husband. The allegations raised are material on the question of the conduct of the parties within

Reported by Miss Nadia Neville, Barrister-at-Law.

1943

ROBINSON v. ROBINSON.

the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 1, and should be inquired into. [He referred to *Restall* v. *Restall* (1), *Mould* v. *Mould* (2), and *Lindsay* v. *Lindsay* (3)].

Harold Brown for the wife. The matter is res judicata. Further, it is against public policy that a husband who has allowed his wife to divorce him on the ground of his adultery should be permitted to make allegations of adultery against her when she applies for maintenance.

HENN COLLINS J. It has been contended on behalf of the wife that it is no longer open to the husband to raise the issue of her adultery because it is res judicata. That phrase is used to include two separate states of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis for that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts, in any subsequent litigation between them. The other aspect of the term arises where a party seeks to set up facts which, if they had been set up in the first suit, would or might have affected the decision. That is not strictly raising any issue which has already been adjudicated, but it is convenient to use the phrase res judicata as relating to that position.

In the present case I have to consider both aspects. First, on the strict interpretation of res judicata, was the issue of the wife's adultery involved in the decree which was granted in the divorce? If it was, that issue would be concluded between the parties and could not be litigated again in these proceedings: *Lindsay* v. *Lindsay* (3). An allegation of the wife's adultery might, but not necessarily would, have afforded a conclusive answer to her petition. She might still, although convicted of adultery, have obtained a decree because her adultery would only be a discretionary bar. The issue of adultery does not seem to me to be fundamental to the decree nor necessarily involved in it. I, therefore, do not think that the matter is res judicata in the strict sense of the term.

That, however, does not necessarily dispose of the case because there is the statutory direction in s. 190, sub-s. 1, of the Act of 1925 that, in considering a question of maintenance and security, the court must have regard, among other things,

(1) [1930] P. 189.
(2) [1933] P. 76.
(3) [1934] P. 162.

to the conduct of the parties. Mr. Fairweather, relying on *Mould* v. *Mould* (1), says that the conduct of the husband in not producing the evidence at the hearing of the suit does not affect the position under the sub-section. On the other hand, Mr. Harold Brown says that in the public interest a man ought not to be allowed to stand by and allow his wife to obtain a decree which she might not have been granted if the court had known certain facts, and then to set up those facts in opposition to an application for maintenance. This aspect of the matter raises the greater difficulty. I do not think that the question would have arisen but for a doubt which Sir Boyd Merriman P. expressed in *Lindsay* v. *Lindsay* (2), where he said: "In *Mould* v. *Mould* (1), Bateson J. "held that the rule laid down in *Restall* v. *Restall* (3) extended "to maintenance proceedings in a case of dissolution of marriage "in which there had been no defence to the original petition, "although the conduct in question might have afforded "possible defences which would have been an answer to the "original petition, if pleaded. Speaking for myself, I should "desire to consider the matter further before holding that that "result followed from the decision in *Restall* v. *Restall* (3)."

Restall v. *Restall* (3) was a case in which the misconduct which was sought to be set up in maintenance proceedings would have had no bearing on the matters in issue between the parties, and, therefore, the learned President, if I may respectfully say so, very wisely declined to regard *Restall* v. *Restall* (3) as extending to a case in which such misconduct was material to the issue, and I have to decide whether the doubt he expressed whether it extended even to a case where that misconduct might have been material to the issue is well founded.

The view to which I have come is that, although proceedings under s. 190, sub-s. 1, are separate proceedings from those for dissolution, a party ought not to be allowed to refrain from using at the hearing of a suit for divorce information which he had, or which, but for his carelessness, he might have had, and then, when his pocket begins to be affected, propose to prove that information and put the petitioner to the expense of a separate issue. I dismiss this summons, with costs.

Summons dismissed.

(1) [1933] P. 76.
(2) [1934] P. 162, 166.
(3) [1930] P. 189.

1943

ROBINSON *v.* ROBINSON.

Solicitors for the husband : *Pritchard, Englefield & Co., for Chamberlain & Martin, Bognor Regis.*

Solicitors for the wife : *Marcy, Russell, Cook & Co.*

1943

Feb. 25.

THE RAMSDEN.

Shipping—Collision—Towage—Conditions—" On hiring of tug for " towage services master and crew become servants of vessel towed "— " Conditions of towage apply while tug is in attendance upon, or " engaged in any manœuvre for purpose of making fast to, the vessel."

The defendants' tug, which had been ordered to take the plaintiffs' vessel into dock, came out of the dock and proceeded towards the vessel. When the tug was about fifty feet off the vessel's starboard side and was moving in the opposite direction, she negligently starboarded the wheel and struck the vessel at right angles. By the conditions contained in the towage contract, on the hiring of the tug for towage services her master and crew became the servants of the vessel towed, and the defendants ceased to be responsible for their acts or defaults. The conditions of towage were also expressed to apply while the tug was in attendance upon, or engaged in any manœuvre for the purpose of making fast to, the vessel :—

Held, (i.) that the hiring clause only came into operation when the hiring began, namely, when the tug was actually towing, but (ii.) that, although the action taken was negligent, the tug was manœuvring to get into position to make fast, so that the towage conditions applied and the defendants were absolved from liability.

ACTION of damage tried under the Short Cause Rules on an agreed statement of facts.

The plaintiffs were The Morrison Steamship Co., Ld., owners of the steamship *Elmdale* ; the defendants were the London, Midland and Scottish Railway Co., owners of the tug *Ramsden*. On December 20, 1941, the plaintiffs orally ordered two tugs from the defendants' agents at Barrow to take the *Elmdale*, a vessel of 4872 tons, into Barrow dock on her arrival off the port. The tugs were employed on the terms of the Towage Conditions, contained in a booklet entitled "Barrow Harbour and Docks Tide Tables and General "Information, 1939." The conditions included the following : "On the hiring of the tug for towage services, the master and

"crew thereof become the servants of and identified with the "vessel . . . . towed and their owners, and are under the "control of the persons in charge of such vessel . . . . during "the performance of the contract, the company only under- "taking to provide motive power." "The company will not "be responsible for the acts or defaults of the master or crew "of the tug . . . . nor for any damage . . . . that may "occur to the vessel towed . . . . and the company shall be held "harmless and indemnified by the hirer against all such "damage . . . ." "These conditions of towage shall apply to "any damage . . . . that may occur to the vessel . . . . "requiring the tug . . . . while the tug is in attendance upon, "or engaged in any manœuvre for the purpose of making "fast to . . . . the vessel . . . . requiring the tug." The *Elmdale* arrived off Barrow harbour on December 21 and anchored outside until December 22, when she proceeded up channel towards the dock. When the *Elmdale* was about 500 yards from the dock entrance, two tugs, one of which was the *Ramsden*, came out of the dock and proceeded towards the *Elmdale*. The *Ramsden*, when about abreast of the *Elmdale's* fore-rigging on the starboard side and distant about 50 feet, put her wheel to starboard and struck the *Elmdale* about at right angles. Those on board the *Elmdale* were in no way to blame for the collision which was solely caused by the negligent navigation of the *Ramsden* by those on board her who were the usual crew and were paid by the defendants.

Owen Bateson for the plaintiffs. On the construction of the towage contract the "hiring" of the tug on which the master and crew would become the servants of the vessel towed would only start when the tug began to tow: see *The St. Machar* (1). The tug, therefore, was not "in attendance "upon" the *Elmdale* when she was coming from the dock to help the *Elmdale* in. The tug may have been manœuvring, but it was not to make fast. Consequently, the towage conditions do not apply: see *The Uranienborg* (2).

E. W. Brightman for the defendants. The hiring contract began to operate when the tug cast off from the jetty and began to proceed towards the *Elmdale*. If the tug was under hire at that time the "attendance clause" is immaterial, but the tug, when manœuvring towards the ship, was obviously "in attendance," for the manœuvre, although negligent,

(1) (1939) 64 Ll. L. Rep. 27. (2) [1936] P. 21.

1943

THE RAMSDEN.

could only have been made for the purpose of making fast.

Bateson replied.

BUCKNILL J. Mr. Brightman, on behalf of the defendants, first relied on the hiring clause and argued that the tug was hired from the time when she got under way from the dock to go out to the *Elmdale*. In my view, however, that is giving too wide a meaning to the word " hiring " in that condition, and the hiring there contemplated by the parties started when the tug was actually towing. The condition refers to " the "vessel towed." It would be impossible to suppose that the tug was under the control of the tow if the tow was miles away and the tug was proceeding down the river to take her in tow. Moreover, if that were the right reading, it would seem to make the second condition in the towage contract unnecessary.

Mr. Brightman further argued that at the time of the collision the tug was in attendance on the *Elmdale* and was manœuvring for the purpose of making fast to her. Counsel have agreed that the court is entitled to draw all reasonable and proper inferences which arise from the somewhat meagre statement of facts, and I have come to certain conclusions. In the first place, I think that this manœuvre was deliberate and had a rational objective. No suggestion is made to the contrary. That being so, I ask myself what reasonable object the tug had except to get into a position in which she could make fast ? The tug which was leading the *Ramsden* was to make fast to the stern and she went down past the *Elmdale* and turned round to get into position to make fast to the stern. Therefore, it is clear that the time for making fast had arrived. Indeed, the ship was coming up on the flood tide, and, when the tug went out, was only a quarter of a mile away, so she must have been about off the dock entrance when the accident happened. The tug was only fifty feet away from her and then put her wheel to starboard. I can conceive of no reasonable explanation of that manœuvre except that she also wanted to make fast to the bows of the ship. The most probable reasons for the collision seems to me to be that she, the tug, misjudged either the speed of the tow or the distance which she was from the tow, or that she did not put her wheel over hard enough, or that she did not take her way off sufficiently. I have no doubt that at the time of the collision the tug was in attendance on the ship and was engaged in a manœuvre for

the purpose of making fast. That being so, I must hold that these towage conditions apply and that the defendants are absolved from liability.

1943
THE RAMSDEN.

Judgment for defendants.

Solicitors for plaintiffs: *Botterell & Roche, for Ingledew, Mather & Dickinson, Newcastle-on-Tyne.*
Solicitor for defendants: *Alexander Eddy.*

E. C. M. T.

Considered. PAOLANTONIO *v.* PAOLANTONIO. [1950] 2 All E.R. 404.

LUCCIONI *v.* LUCCIONI.

C. A.
1943
Mar. 8.

Divorce — Practice — Petition — Service — Dispensation — Knowledge by respondent of petition or intention to prosecute it—Opportunity to defend—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 42.

The discretion given to the court by the proviso to s. 42 of the Matrimonial Causes Act, 1857, to dispense with the service of the petition in a matrimonial cause where it seems necessary or expedient so to do is absolute and cannot be fettered by general rules or conditions, but, before dispensing with the service of a petition which involves a change in the status of the spouses, the court may properly take into consideration such relevant matters as whether the respondent is aware of the fact that the petition is being prosecuted, or, at the very least, of the intention to prosecute it, and, in either case, has had time and opportunity to indicate whether he or she desires to defend.

APPEAL from Lord Merriman P.

By her petition, which was dated October 21, 1942, the wife charged desertion against her husband as from October, 1936, when, it was alleged, he left her against her will, having announced his intention of going to Morocco or France. In her affidavit in support of the present application the wife stated that the husband, who was a French national, went to Paris and that she ascertained the address at which she believed he was living until shortly after the outbreak of war in September, 1939, but she stated that since then she had received no communication from him or anyone on his behalf and did not know his present whereabouts. Inquiries made in July, 1940, shortly after the capitulation of the French armies, through the Foreign Relations Department of the Red Cross and St. John War Organization proved abortive. By the present summons the wife applied, under s. 42 of the Matrimonial Causes Act, 1857, for leave to dispense with the

BIBL. LONDON UNIV.

C. A. 1943

LUCCIONI v. LUCCIONI.

service of the petition on her husband. It was admitted at the hearing of the summons that the husband's domicil of origin was in France.

Lord Merriman P. held that in the case of petitions which involved a change of status, and where any form of substituted service was impossible, the court, before dispensing with service, should require to be satisfied that the respondent spouse had become aware of the fact that the petition was being prosecuted, or, at the very least, of the intention to prosecute it, and, in either case, had had time and opportunity to indicate whether he or she desired to defend. Whether that requirement was satisfied would be decided on the merits of the individual case. It might be that in the case of a petition which, as between the spouses, did not involve a change of status, or of the service of a petition for divorce on a co-respondent against whom neither damages nor costs were claimed, or on a woman named in a wife's petition, some relaxation was permissible, and the same might apply to subsequent applications for ancillary relief arising out of a petition which had been duly served. On the facts of the present case he was not prepared to make an order dispensing with service of the petition altogether, and he, therefore, dismissed the summons.

The wife appealed.

Mar. 8. *Beyfus K.C.* and *M. P. Solomon* for the wife. By the proviso to s. 42 of the Matrimonial Causes Act, 1857, the court is given a very wide and complete discretion to dispense with the service of a petition on the respondent in cases where it seems necessary or expedient so to do, and the present obviously is a proper case for the exercise of that discretion. The learned President did not deal with the application on the facts of the case, but has treated it as a matter of general principle, and has so dealt with the section as in effect to repeal it. He has laid down what are conditions precedent to dispensing with service which would in effect prevent the proviso to s. 42 applying in all cases where the respondent spouse cannot be found. Where an absolute discretion is given, it should not be fettered with any rigid rules: *Evans* v. *Bartlam* (1). *Read* v. *Read* (2) and *Cooke* v. *Cooke and Quaile* (3) were also referred to. The discretion

(1) [1937] A. C. 473, 488.
(2) [1942] P. 87.
(3) (1858) 28 L. J., P. & D. 5.

given by the proviso appears to have been freely used in the years immediately succeeding the passing of the Act of 1857, but as substituted service came into vogue, the need for dispensing with service largely disappeared. It is to be noted, however, that while ss. 41 and 43 of the Act were repealed by the Matrimonial Causes Rules, 1937, r. 82 (1.), s. 42 was not repealed. The President has erred in principle and his order should be reversed.

SCOTT L.J. The learned President delivered a very carefully considered judgment, stating all the facts and pointing out (inter alia) that the petition might have been presented in October, 1939, and that, if it had, substituted service could have been effected between then and the occupation of France by the Germans in June, 1940. He agreed that substituted service was impossible at the present time, and, therefore, he treated the petition as a substantive application for dispensing with service altogether. In the exercise of his discretion, which, under s. 42 of the Matrimonial Causes Act, 1857, is absolute, he refused to give that leave. In his judgment he made a statement which Mr. Beyfus, on behalf of the wife, submits was erroneous in law, as imposing on himself a fetter on the exercise of the discretion which the section does not impose, and, therefore, Mr. Beyfus contends, at the least the case should be sent back for re-consideration. The passage in the judgment which has been criticized is: "In "my opinion, in the case of petitions which involve a change "of status, and where any form of substituted service is "impossible, the court, before dispensing with service, should "require to be satisfied that the respondent spouse has become "aware of the fact that the petition is being prosecuted, or, "at the very least, of the intention to prosecute it, and, in "either case, has had time and opportunity to indicate whether "he or she desires to defend." Mr. Beyfus submitted that those requirements would constitute conditions of a general kind for the exercise of jurisdiction under s. 42. Had that been the case, the learned President would have been wrong, for, as Lord Wright pointed out in *Evans* v. *Bartlam* (1), a discretion which is unfettered by law must not be fettered by judicial interpretation of it. In my view, however, the learned President did not intend to impose limitations of that kind. The hypothetical events connected with a petition to

(1) [1937] A. C. 473, 488.

C. A.
1943
LUCCIONI
v.
LUCCIONI.
Scott L.J.

which he refers are all relevant matters for consideration in connexion with the exercise of the discretion, and I think he only spoke of them as matters which, if proved, would be additional reasons for the exercise of the discretion.

That being so, I treat this as an appeal from an unfettered exercise by the President of the discretion given to him under the Act of 1857. I should be very slow, in any event, in such a matter to differ from the considered exercise of discretion by the President of the Divorce Division in a matter with which he is so essentially familiar, but in the present case I should have exercised the discretion in the same way myself on the ground that it is a real hardship on a respondent to a divorce petition to be deprived of his status by a decree which is made in his absence and without his knowledge of the pending proceedings. That is a matter of justice to a respondent analogous to the presumption in criminal law that a person charged is presumed to be innocent until he is proved guilty. Although I have great sympathy with the wife in the present case I cannot do injustice to the husband. The appeal must be dismissed.

MACKINNON L.J. I agree.

DU PARCQ L.J. I agree. In my opinion, if I may say so with respect, on the facts of this particular case the learned President's decision was right. I also agree with my Lord that the passage from Lord Wright's opinion in *Evans* v. *Bartlam* (1), where he emphasized the importance of laying down no rules which would fetter the exercise of the discretion of the court, is much to the point, but Lord Wright added: "It is, however, often convenient in practice to lay down, "not rules of law, but some general indications, to help the "court in exercising the discretion, though in matters of "discretion no one case can be an authority for another." I think that what was said by the President in the present case may properly be regarded as such a general indication, but it is most important that every judge who is asked to make an order dispensing with service of a petition of divorce should remember that in matters of discretion no one case can be an authority for another. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Spiro & Steele.*

(1) [1937] A. C. 473, 488.

A. W. G.

EASTHAM *v.* EASTHAM.

1943
Apr. 7.

Divorce — Practice — Petition — Co-respondent — Making alleged male adulterer co-respondent—Name and identity unknown—Dispensation on special ground — Matrimonial Causes (Amendment) (No. 1) Rules, 1943 (*St. R. & O.*, 1943, *No.* 240/*L.* 7), *r.* 3—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 177, *sub-s.* 1.

Although the new r. 5 of the Matrimonial Causes Rules, 1937 (substituted therein by r. 3 of the Matrimonial Causes (Amendment) (No. 1) Rules, 1943), which deals with the joinder of co-respondents in suits for divorce, only refers to a husband petitioner making a named alleged adulterer a co-respondent, it is still necessary under s. 177, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, to make every alleged male adulterer, named or unnamed, a co-respondent unless excused by the court from doing so on special grounds.

SUMMONS adjourned into court for judgment.

A husband in his petition for divorce alleged the adultery of his wife with a man unknown, and no order of the court dispensing with the naming of the co-respondent had been obtained. The registrar decided that an order dispensing with the naming of a co-respondent was necessary before a certificate could be granted that the case was ready for trial. The husband appealed.

Cartwright, Cunningham & Co. (for H. J. Widdows & Son, Leigh) (solicitors) submitted that the new r. 5 of the Matrimonial Causes Rules, 1937, which had been substituted for the old r. 5 by the Matrimonial Causes (Amendment) (No. 1) Rules, 1943, r. 3, made it unnecessary to file evidence of attempts made to trace and identify the alleged adulterer, he being unknown and unnamed, and that, consequently, no order for leave to dispense with making the unknown adulterer a co-respondent was necessary.

PILCHER J. The terms of the old r. 5, so far as material, are as follows: "Unless otherwise directed, where a petition "for divorce . . . . alleges adultery every alleged adulterer, "if male, and living at the date of the filing of the petition, "shall be made a co-respondent in the cause." The old rule thus requires every petitioner who alleges adultery by his wife with a co-respondent whose name and identity are

1943

EASTHAM v. EASTHAM.

Pilcher J.

unknown to make that alleged adulterer a co-respondent in the cause "unless otherwise directed." Before a direction dispensing with the necessity for making an unknown alleged male adulterer a co-respondent is made, it is the practice of the Divorce Registry to require the petitioner to file evidence of attempts to trace and identify such alleged adulterer in order that the Registry may be satisfied that proper efforts have been made in that respect. The material words of the new r. 5 are: "Unless otherwise directed, where an alleged male "adulterer is named in a husband's petition for divorce . . . . "such alleged adulterer shall, if living at the date of the filing "of the petition, be made a co-respondent in the cause . . . ." It will be observed that, unlike the old r. 5, the new rule does not in terms deal with the position of an unnamed adulterer, and only requires the petitioner to make named adulterers co-respondents.

The petitioner argues that the new r. 5 does not deal with unnamed adulterers, and that, consequently, it is unnecessary for him to file evidence of attempts to trace and identify an unnamed adulterer. The petitioner's argument, although attractively presented, is in my view fallacious. Sect. 177, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, is in the following terms: "On a petition for "divorce presented by the husband or in the answer of a "husband praying for divorce the petitioner or respondent, "as the case may be, shall make the alleged adulterer a "co-respondent unless he is excused by the court on special "grounds from so doing." There is no doubt that the words in this section—"alleged adulterer"—comprise an adulterer whose name and identity are unknown to the petitioner: see *Pitt* v. *Pitt* (1). The section specifically enacts that in a husband's petition every alleged male adulterer shall be made a co-respondent unless the petitioner "is excused by the court "on special grounds from so doing."

The Matrimonial Causes Rules, both old and new, are made under the powers conferred by s. 99 of the Supreme Court of Judicature (Consolidation) Act, 1925. The old r. 5 reproduces to some extent the effect of s. 177, sub-s. 1, in that it requires every alleged male adulterer to be named "unless otherwise "directed." It is true that the new r. 5 only refers to named male adulterers, but the effect of s. 177, sub-s. 1, still remains unimpaired, and it is still necessary, in spite of the altered

(1) (1868) L. R. 1 P. & M. 464.

1943

EASTHAM v. EASTHAM.

Pilcher J.

wording in the new r. 5, for a male petitioner to make every alleged male adulterer, whether named or unnamed, a co-respondent, unless he is "excused by the court on special "grounds from so doing." To be excused from making every alleged male adulterer a co-respondent, a petitioner still has to show special grounds, and it is for this reason that he is required to satisfy the registrar by affidavit that he has made proper attempts to trace and identify any alleged adulterer whose name and identity are said to be unknown. It is true that s. 99, sub-s. 1 (*g*) of the Act, provides that "enactments "which relate to matters with respect to which rules are made "under this section" may be repealed by rule, but s. 177, sub-s. 1, is probably not such an enactment, and, in any case, it is not repealed. In my view, the necessity for obtaining an order dispensing with the naming of a co-respondent is, and has been since January 1, 1926, required by the terms of s. 177, sub-s. 1, of the Act of 1925. The alteration in the wording of r. 5 does not, therefore, affect the practice which has obtained hitherto in the Registry, and I think that the registrar was right in deciding that an order dispensing with the naming of a co-respondent was necessary.

T. A. H.

HAYS *v.* HAYS.

1943
Apr. 15.

Divorce—Decree absolute—Expedition—Application to judge of assize—Convenient course to be followed—Costs—Inquiries by King's Proctor—Poor person's petition.

Where an application is made to a judge of assize that the making absolute of a decree nisi should be expedited, a convenient course to follow is that which is the practice in the Divorce Division, namely, not to make an order for the shortening of the usual time for making a decree nisi absolute to some specified period, even with a proviso that, should the King's Proctor lodge an objection to such period within a prescribed time, the question of abridgement be referred to a judge of the Divorce Division, but to express an opinion that the case is a fit one for expedition, and, if it be proceeding in a district registry, to direct that the papers be transferred to London at once, or, if it be proceeding in the principal registry, to direct that the matter be put in train immediately. In such cases the petitioner's solicitor would be well advised to communicate with the King's Proctor at once, so

1943

HAYS v. HAYS.

that the King's Proctor may begin his inquiries at the earliest possible moment.

As a rule no costs are asked for or allowed in poor persons' cases, but, with regard to this matter, the principle that the King's Proctor is entitled to the special costs of his inquiries is the same in all cases.

SUMMONS.

On March 24, 1943, a wife petitioner, suing as a poor person, obtained a decree nisi against her husband at Leeds assizes. She then applied that the date for making absolute the decree nisi should be expedited, she wishing to marry a serving soldier who was likely soon to be going abroad. The judge granted the application and made an order reducing the usual six months to one month, but he added this proviso: "Provided that, should the King's Proctor lodge an objection to "such period within fourteen days from the date of the hearing, "the question of abridgement be referred to a judge of the "Probate, Divorce and Admiralty Division in London." The King's Proctor lodged an objection within fourteen days, and he now applied for an extension of the time.

Holroyd Pearce for the King's Proctor.
Leslie Brooks for the petitioner.

LORD MERRIMAN P. It may be helpful if I make some general observations on the practice governing this matter in this Division, for it depends on practice and not on any rule. As is well known, it is impossible for the King's Proctor to make inquiry in every case in which a decree nisi is pronounced. There must be a certain element of 'guess-work—it may possibly be informed guess-work—in the selection of cases for inquiry, but in any case in which special application is made for the shortening of the time it is the invariable practice of the King's Proctor, and, in my opinion, it is his duty, to make special inquiries. When an application to expedite the making of a decree absolute comes before a judge it is the practice to allow the King's Proctor's costs of the inquiries as against the petitioner. As a rule no costs are asked for or allowed in poor persons' cases, but in this respect the principle is the same in all cases and the King's Proctor is entitled to apply for the special costs of the inquiries. From this it follows that the King's Proctor may be put in a very grave difficulty if any encouragement is given to an undue number of

applications to expedite the making of decrees absolute. In this Division, the judge is often asked at the trial to say that such an application should be encouraged, and if, and only if, it is thought that the case merits special consideration is such encouragement given. But the decision is never made then and there. The most that is said is that the case seems to the judge to be "fit for expedition," and the party is advised to get into communication with the King's Proctor at once with a view to expediting the inquiries, the matter being ultimately dealt with by summons.

Great difficulties, too, are necessarily created for the King's Proctor if an order is made for a definite shortening to some prescribed period by the judge of assize. The King's Proctor at that time has not been heard, and he does not know whether or not it is a case in which it will be necessary for him to intervene or to take steps to bring any matters to the notice of the court. Moreover, the circumstances in these cases vary enormously. In some cases the inquiries may be easy and short, but in other cases they may necessarily be more prolonged. Another aspect of the matter is that the King's Proctor is not provided with an unlimited staff, and, if an order for a reduction of the period by a definite time were made habitually at the hearing, it would necessarily operate so as to give an unfair advantage to the cases in which the order was made.

In the present case, the learned judge added a proviso to the order and thus enabled the King's Proctor to make the present application. It is not for me to lay down any practice for His Majesty's judges of assize, but, if I may venture to make a suggestion, it is that the desired result would be obtained if, instead of making an order for the reduction of the period or even an order for the reduction of the period with a proviso such as this, they were to follow the lines adopted in this Division and express the opinion, without making an order, that the case is one for expedition and, if the case is proceeding in a district registry, direct that the papers be at once transferred to London, or, if the case is already proceeding in the principal registry, direct that the matter be put in train immediately. In such cases the petitioner's solicitor will be well advised to communicate with the King's Proctor immediately, so that the King's Proctor may begin his inquiries at the earliest possible moment. But the King's Proctor will not begin his inquiries until he is

1943

HAYS v. HAYS.

The President.

assured in one way or another that the petitioner is aware of his obligations in the matter of providing for the King's Proctor's expenses in a proper case.

In the present case I am anxious that no injustice shall be done to the petitioner merely because the case happens to have been selected to bring the matter forward. I have no means of knowledge whether the matter is really one of extreme urgency now or not. It may be that the soldier whom the petitioner wishes to marry is no nearer going overseas now than he was when the matter was first brought forward in March. I propose, therefore, to extend the time indefinitely so as to enable the King's Proctor to complete his inquiries. As is the invariable practice, the King's Proctor will inform the petitioner's solicitors immediately he is ready so that the application to expedite can be brought before a judge in the ordinary course. As the month has nearly elapsed and a short vacation is approaching, I shall, having regard to the special circumstances of this case, give liberty to the petitioner to make an application as a matter of urgency, if the circumstances warrant it, before the King's Proctor has intimated that his inquiries are complete.

Solicitors: *The King's Proctor; Pedley, May & Fletcher, for Redpath, Marshall & Holdsworth.*

T. A. H.

1943

May 5, 10.

HIGGINS *v.* HIGGINS AND BANNISTER.

Divorce—Condonation—Evidence—Marital intercourse—No fraud by wife—Revival of condoned adultery—Desertion less than statutory period.

In the absence of fraud by a wife marital intercourse between the spouses at the instance of the husband in full knowledge of the wife's adultery affords conclusive evidence of condonation of that adultery.

Desertion for less than three years is a matrimonial offence which revives condoned adultery.

UNDEFENDED petition for divorce.

By his petition, dated November 17, 1941, the husband, Hedley John Higgins, sought the dissolution of his marriage to his wife, Muriel Enid Higgins, on the ground of her adultery

in July, 1941, with Frederick Charles Ernest Bannister, the co-respondent. On or about August 5, 1941, the wife admitted to the husband her adultery with the co-respondent, and there was no question that such adultery had occurred. After a long discussion between the husband and the wife, the wife promised to have nothing further to do with the co-respondent. The husband was anxious for a reconciliation, and, relying on the wife's promise, he agreed to forgive her, and that night he slept with her and marital intercourse took place. Two days later the co-respondent called at the matrimonial home. The husband did his best to induce the wife to break off her association with the co-respondent, but the wife said that she did not intend to do so. A violent scene followed in which the co-respondent knocked the husband down. The wife then packed up her belongings and went off with the co-respondent, and she never returned to the matrimonial home. There was no evidence of subsequent adultery between the wife and the co-respondent.

W. Latey for the petitioner.

PILCHER J. On the facts of this case, certain propositions of law call for consideration. It is clear that, when the husband forgave his wife her previous admitted adultery and had marital intercourse with her, he thereby condoned that adultery. I have no means of knowing how far the wife's promise to give up the co-respondent was a bona fide promise when it was made. I have no reason to suppose she had her tongue in her cheek when she made that promise, and it would be improper for me to infer any such thing, so I must assume that, when the reconciliation took place, the wife did intend to give up the co-respondent.

It is suggested by Mr. Latey, who appears for the petitioner, that forgiveness may be subject to a condition, and he sought to argue that where, as in this case, a husband forgives his wife's adultery on the condition that she gives up the co-respondent, that is forgiveness with a condition, and subsequent marital intercourse between the parties will not afford conclusive evidence of condonation against the husband. In my view, that proposition is ill founded, at any rate, in the absence of something which amounts to fraud, as in *Prior* v. *Prior and Strong* (1) where the wife falsely pretended to her

(1) Unreported, see Latey on Divorce (12th ed.), p. 70 (*x*).

1943

HIGGINS v. HIGGINS AND BANNISTER.

Pilcher J.

husband that the adultery which she admitted had taken place when she had been "doped," and it was said that subsequent marital intercourse between husband and wife in those circumstances did not afford conclusive evidence of condonation against the husband. That one can well understand, but, in the absence of fraud by the wife, I am of opinion that marital intercourse at the instance of the husband, with full knowledge of his wife's adultery, affords conclusive evidence of condonation.

That leaves the question whether or not what transpired after the reconciliation affords any ground for saying that the wife's adultery, condoned by the husband, was revived by her subsequent conduct. To revive a condoned matrimonial offence, a subsequent matrimonial offence must be committed. It has been held in a number of cases that condoned adultery will be revived by subsequent cruelty, by desertion for the statutory period, or by failure to comply with an order for restitution of conjugal rights, which also constitutes the matrimonial offence of desertion. After the violent scene between the petitioner and the co-respondent the respondent and the co-respondent went off together, and there is no question but that the wife then deserted her husband without cause. That desertion, however, took place in August, 1941, and the petition is dated November, 1941. The desertion did not, therefore, begin three years before the institution of the proceedings.

In a case of this kind one has considerable sympathy with the petitioner who did his best to become reconciled with his wife, but I must not allow myself to be swayed by any sympathy I may feel with him. I am, however, able to give effect to my inclination because, in *Jordan* v. *Jordan* (1), there is a passage in the judgment of the learned President (2), which makes it clear that, while judges have studiously refrained from attempting to give any definition of the word "desertion," desertion as a matrimonial offence can exist independently of its duration. I respectfully adopt the view which the learned President expresses there. I am satisfied that desertion, independently of its duration, is such a matrimonial offence as will revive condoned adultery, although, in so far as divorce or judicial separation are concerned, no remedy lies unless the desertion has continued for the statutory period.

(1) [1939] P. 239. (2) Ibid. 251.

1943

HIGGINS v. HIGGINS AND BANNISTER.

By leaving her husband as she did, and remaining away from him for the three months before the institution of these proceedings and by continuing to remain in desertion until the present day, the wife committed the matrimonial offence of desertion, and, in my opinion, although that desertion has not continued for the statutory period of three years, which would enable the husband to found a petition for divorce on it, it is none the less a matrimonial offence which will revive condoned adultery.

Decree nisi.

Solicitors: *Gibson & Weldon, for Randle J. Evans, Wolverhampton.*

T. A. H.

IN THE ESTATE OF RIPPON.

1943

Jan. 14; *Apr.* 6, 21.

Will—Soldier—"Actual military service"—Soldier called out before embodiment or mobilization of forces or declaration of war—Service required to ensure preparedness for defence of realm against external danger—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 11.

Whether or not a soldier is "in actual military service" so as to enable him to make a privileged will under s. 11 of the Wills Act, 1837, depends on the facts of each case and the circumstances which existed at the time.

On August 25, 1939, an artillery officer in the Territorial Army, who had earlier on that day been ordered to rejoin his battery in England, made a testamentary document which did not comply with the formalities required by the Wills Act, 1837. His services with his battery were "urgently required for ensuring preparedness for the defence of the realm against external danger," but the Territorial Army was not embodied until September 1 and it was not mobilized until September 2, while war was not declared between Great Britain and Germany until September 3:—

Held, that, on August 25, 1939, the officer was "in actual military service" within the meaning of s. 11 of the Wills Act, 1837, and was, therefore, entitled to make a privileged will.

MOTION.

Mrs. Jean May Rippon applied for a grant of letters of administration with the will annexed of the estate of her husband, Major James Noel Rippon. On August 25, 1939, Major Rippon, who, before the outbreak of war, was an officer in the Territorial

1943

RIPPON, IN THE ESTATE OF.

Army, while at his home at Epsom, Surrey, received orders to rejoin at Lee, Kent, the battery of the Royal Artillery which he commanded. Major Rippon was so "called out for service" under directions given on August 22, 1939, by the Secretary for War in pursuance of the powers vested in him under the Reserve and Auxiliary Forces (Army) Order, 1939, in accordance with s. 1 of the Reserve and Auxiliary Forces Act, 1939, the Secretary for War being satisfied that the service of the members of the reserve and auxiliary forces was "urgently "required for ensuring preparedness for the defence of the "realm against external danger." Before leaving his home on August 25, 1939, Major Rippon wrote out a testamentary document which was signed by him but was witnessed only by his sister, Mabel Parkinson. By this document Major Rippon, after giving a specific legacy to his infant son, gave the whole of his estate to his wife, but he did not appoint an executor. On September 1, 1939, the Territorial Army was embodied, and it was mobilized on September 2, 1939. On September 3, 1939, Great Britain declared war on Germany. On September 23, 1942, a certificate was received from the War Office stating that Major Rippon had been killed in action in France on, or shortly after, May 30, 1940.

Army order No. 94 of 1940, stated that troops in commands at home and abroad were "on active service" within the meaning of s. 189, sub-s. 1, of the Army Act, with effect from September 3, 1939.

Hollins for the applicant.

Marshall-Reynolds (*T. A. Harrison* with him) for sisters of the deceased.

Cur. adv. vult.

Apr. 21. PILCHER J. read the following judgment. It has been submitted on behalf of the applicant that Major Rippon was "in actual military service" at the time when he executed the testamentary document in question, although no state of war existed at the date when the document was actually written.

A review of the cases dealing with privileged wills has made it clear that there has been some doubt whether any soldier could be said to be "in actual military service" unless this country was at war. Sect. 11 of the Wills Act, 1837, provides: "Any soldier being in actual military service . . . . may dispose

"of his personal estate" without the formalities required by the Act. It is well known that the principle which is embodied in this section was adopted from the Roman law which accorded a similar privilege with regard to the making of testamentary dispositions to Roman soldiers who were "in expeditione." The exemptive words "in actual military "service" originally appeared in the same form in s. 23 of the Statute of Frauds.

In *Drummond* v. *Parish* (1), it was sought to establish that every soldier on full pay was in actual military service and thus entitled to dispose of his personal property by a soldier's will not duly executed. In that case Sir Herbert Jenner Fust, in an elaborate judgment, states his conclusion on this point as follows: "Being of opinion, from the result of the investi- "gation of the authorities, that the principle of the exemption, "contained in s. 11 of the Act, was adopted from the "Roman law, I think it was adopted with the limitations to "which I have adverted, and that, by the insertion of the "words 'actual military service,' the privilege, as respects "the British soldier, is confined to those who are 'on an "'expedition.'" The meaning to be attached to the words "in actual military service" has been considered in a number of later cases, the most important of which, for my present purpose, is *In the Goods of Hiscock* (2). The facts in that case were that during the South African War a private soldier in a volunteer battalion volunteered for service in South Africa, and, pursuant to an order, went into barracks where he made a will, being at that time under the age of 21 years. Shortly after this he received orders to embark for South Africa where he met his death. At the time he made his will the soldier was not on an expedition, but Sir Francis Jeune none the less pronounced for the will on the ground that, at the time he made it, the testator had taken a step toward joining the forces in the field, and said (3): "The step "may be a small one, both as regards place and time. In "case of invasion or civil war—both circumstances which were "more present to the minds of the persons who framed the "laws of this country in the time of Charles II. than they are "to the legislators of our own time—the step might be merely "that a man was taken from his home to man the walls or "defences of his own native town. In the case of invasion,

(1) (1843) 3 Curt. 522.
(2) [1901] P. 78.
(3) Ibid. 83.

1943

RIPPON, IN THE ESTATE OF.

Pilcher J.

"I should imagine, for instance, that a man living at Dover, "and who was called upon to go into the fortifications at "Dover and to assist in the defence, would have been within "the meaning of the term 'in expeditione' or 'actual military "'service,' although the movement made or step taken by "him would be small in point both of time and locality or "distance." It will be observed that Sir Francis Jeune seems to recognize that the idea of an expedition, on which the exemption in the Wills Act is admittedly founded, must not be applied too strictly. Sir Francis Jeune was evidently prepared to contemplate that a soldier who takes a step under orders with the object of repelling an invasion would be "in actual military service." The matter was taken a little further by Sir Francis Jeune himself in *Gattward* v. *Knee* (1), where the deceased, a soldier stationed at Calcutta, wrote a letter to a friend in South Africa making certain testamentary dispositions. At the time he wrote this letter his battalion, which was stationed in India, had been warned for service and "ordered to mobilize" for active service in South Africa. In the course of his judgment, after stating that, in his view, the document in question was a soldier's will, Sir Francis Jeune said: "In so holding I am perhaps going a "step further than in my recent decision—*In the Goods of* "*Hiscock* (2)—but I have no doubt myself that mobilization, "giving to that word the effect which I understand it to "carry, may be fairly taken as a commencement of that which "in Roman law was expressed by the words in expeditione. "These words meant something more than the English words "'on an expedition,' because it is quite clear that when a "force begins in a sense to engage in or to enter upon active "service, it would be said to be in expeditione. I thought "when deciding the case cited, and I still think, that it is a "fair test to ask whether or not the person whose testamentary "dispositions are in question has done anything; but I "am of opinion that if the order for mobilization has been "received, although the man himself may have done nothing "under it, yet that order so alters his position as practically "to place him in expeditione. Such an order goes beyond a "mere warning. I do not think a mere warning for active "service would be sufficient; but when a force is mobilized "I understand this to be that it is placed under military "orders with a view to some step being taken forthwith for

(1) [1902] P. 99. (2) [1901] P. 78.

"active service. That is what happened in the present "instance: within nine days after the order to mobilize was "given the force embarked for South Africa." These cases, in my view, make it reasonably clear that, if Major Rippon had received his orders to rejoin his battery and had made his will after 11 A.M. on September 3, 1939, this document would be entitled to be treated as a privileged will. From the concluding words of the passage in Sir Francis Jeune's judgment in *Gattward* v. *Knee* (1), it might well be argued that, if he had made his will on September 2, 1939, which was the first day of mobilization, the same would apply, although no state of war existed at that date.

The point which I have to consider is whether, in all the circumstances of the present case, the fact that Major Rippon made his will eight days before the official date of mobilization, and nine days before any state of war existed, alters the situation. It is clear that Major Rippon was not at the material time "on active service," within the meaning to be attached to the words in s. 189, sub-s. 1, of the Army Act. It is, however, common knowledge that on August 25, 1939, the international situation was extremely critical. War was commonly believed then to be imminent, and many instructed persons took the view, not perhaps unreasonably, that this country might be heavily bombarded from the air, and, possibly, invaded, without any formal declaration of war. I have no means of knowing whether the fears which were commonly expressed on this point had any real justification, and I only refer to the matter because I think it not irrelevant to a consideration of the facts of this case. There is no doubt that the situation which prevailed during the last week of August, 1939, was totally different from any which has existed in this country, at any rate, since the Napoleonic wars. It was in these circumstances that the Secretary of State for War, in pursuance of powers conferred on him, caused Major Rippon to be called out for service because the competent authorities considered that his services as a battery commander in Kent were urgently required for ensuring preparedness for the defence of the realm against external danger. The words "external danger" connote to my mind "invasion" or "aerial bombardment," and Major Rippon, as an active territorial officer and a battery commander, was, no doubt, called out before the date of general mobilization in order

(1) [1902] P. 99, 102, 103.

1943

RIPPON, IN THE ESTATE OF.

Pilcher J.

that he might have his battery ready to take proper counter measures at short notice should invasion or aerial bombardment take place in the neighbourhood of his station in Kent.

It is also not irrelevant that the order for general mobilization, which came into force on September 2, 1939, provided that Major Rippon and other officers and men already called up for service should remain where they were, and, so far as I am aware, the general mobilization order did not in any way affect the activities in which Major Rippon had for the last week been engaged.

The decision in *Drummond* v. *Parish* (1), and subsequent decisions in this court, have made it clear that some limitation must be placed on what might otherwise have been considered to be the ordinary meaning of the words "in actual military "service." Attributing to those words their ordinary and natural meaning, I should have had little hesitation in saying that an officer in command of a battery who is ordered to rejoin his battery immediately because the competent military authority considers that his presence with his battery is urgently required to ensure preparedness against aerial attack or invasion is in "actual military service." I am, moreover, of opinion that there is nothing in any case in which the meaning of these words has been considered, which precludes me from so finding. It is true that Sir Francis Jeune, in his judgment in *In the Goods of Hiscock*, in discussing the meaning of the words "in actual military service," said (2): "I think it must be assumed that a state of war exists with "which the soldier is or may be connected." It must be borne in mind, however, that, in expressing this view, the learned President had in mind the facts of the case which he was considering. The opinion which he expresses was not strictly speaking necessary for the decision of that case. In this connexion it is to be observed, moreover, that there is at least one case in which a will has been pronounced for as a privileged will when no state of war existed. I refer to *Limond* v. *Cunliffe* (3). The question whether the document under consideration was or was not a privileged will under s. 11 of the Wills Act came up for consideration by Sargant J. in the Chancery Division in rather unusual circumstances to which it is unnecessary for me to refer. The learned judge decided that the will of an officer in the 6th Punjab Infantry, made

(1) 3 Curt. 522.
(2) [1901] P. 78, 82.
(3) [1915] 2 Ch. 240.

1943

RIPPON, IN THE ESTATE OF.

Pilcher J.

after he had been mortally wounded by a fanatic and at a time when military operations in Waziristan had ceased, was a privileged will. The officer in question formed part of an escort supplied to a party engaged in the delimitation of the frontier. The will was made and the officer died some two months after the date when the operations in Waziristan, for the purposes of granting a war medal, were regarded as having ceased. I only refer to this case to show that the proposition laid down by Sir Francis Jeune, namely, that a state of war must exist before a soldier can make a privileged will, must not be construed too literally. There are also other cases in which privileged wills have been pronounced for when the testator has been engaged in operations which were more in the nature of punitive expeditions than wars preceded by any formal declaration. There are, moreover, several cases dealing with the circumstances in which sailors are entitled to make privileged wills which go to show that the courts, in construing the relevant words of s. 11 of the Wills Act, have inclined towards a liberal interpretation. I need only refer to *In the Estate of Ada Stanley* (1), in which the Irish case of *In the Goods of Hale* (2) is quoted with approval.

In my opinion, whether or not a soldier is "in actual military "service" so as to enable him to make a privileged will, must depend on the facts of each case and the circumstances which existed at the time. In the present instance I think that Major Rippon was ordered on August 25, 1939, to take up duties which constituted him, when performing such duties, "a soldier in actual military service," and, having made his will after he received such orders, he was, in my opinion, on the authority of Sir Francis Jeune's decisions in *In the Goods of Hiscock* (3) and *Gattward* v. *Knee* (4), at the time he made his will, "in actual military service." His will is, therefore, a privileged will, and the applicant is entitled to a grant of administration of his estate with the will annexed.

Order as prayed.

Solicitors for widow: *Emmet & Co.*

Solicitors for sisters of deceased: *Brash Wheeler, Chambers, Davies & Co., for Stanford & Lambert, Newcastle-on-Tyne.*

(1) [1916] P. 192.
(2) [1915] 2 Ir. R. 362.
(3) [1901] P. 78.
(4) [1902] P. 99.

T. A. H.

1943
Mar 31;
Apr. 1, 2,
16.

LUCAS *v.* LUCAS AND HIGH COMMISSIONER FOR INDIA.

Garnishee order—Salary—Indian civil servant—"Sterling overseas "pay"—Debt "owing or accruing" from Crown to civil servant—R. S. C., Or. XLV., *r.* 1.

"Sterling overseas pay" payable to an Indian civil servant is not a debt "owing or accruing" to him from the High Commissioner for India within R. S. C., Or. XLV., r. 1, and, therefore, cannot be attached to answer a judgment or order in garnishee proceedings taken under the rule.

SUMMONS.

The judgment debtor, Lionel John Lucas, was and had been since 1928 an Indian civil servant in the province of Bihar. In 1937 his wife, Anita Florencia Lucas, the judgment creditor, obtained a decree of judicial separation against him, and he was ordered to pay to her alimony at the rate of 400*l.* a year free of tax and 100*l.* a year for the support of the child of the marriage. Mr. Lucas fell into arrears with payments under the order, and he was made bankrupt by his wife or at her instance. At the material time he was in receipt of 30*l.* per month as "sterling overseas pay," which was paid to him through the High Commissioner for India. Mrs. Lucas, being unable to obtain payment of arrears due to her under the order, sought to attach her husband's "sterling "overseas pay," under R. S. C., Or. XLV., r. 1, and she obtained a garnishee order nisi (1) against the High Commissioner for

(1) By Or. XLV., r. 1: "The "court or a judge may, upon the "ex parte application of any "person who has obtained a "judgment or order for the "recovery or payment of money "... and upon affidavit by "himself or his solicitor stating "that judgment has been re-"covered, or the order made, "and that it is still unsatisfied, "and to what amount, and that "any other person is indebted "to such debtor, and is within "the jurisdiction, order that all "debts owing or accruing from "such third person (hereinafter "called the 'garnishee') to such "debtor shall be attached to "answer the judgment or order, "together with the costs of the "garnishee proceedings; and by "the same or any subsequent "order it may be ordered that "the garnishee shall appear before "the court or a judge or an "officer of the court, as such "court or judge shall appoint, "to show cause why he should "not pay to the person who has "obtained such judgment or order "the debt due from him to such "debtor, or so much thereof as "may be sufficient to satisfy "the judgment or order, together "with the costs aforesaid. . . ."

India in respect of arrears of maintenance amounting to 289*l.* 5*s.* 6*d.* The High Commissioner appeared by counsel before the registrar to show cause why the order nisi should not be made absolute, and the matter was adjourned into court.

Tucker K.C. and *Danckwerts* for the High Commissioner. The Crown is not mentioned in Or. XLV., r. 1, and so is not to be included as a "person" who is indebted to the debtor. Therefore, a debt "owing or accruing" from the Crown cannot be attached to answer a judgment or order. In any event, this pay could never be a debt due to the civil servant from the High Commissioner, for the High Commissioner could not be sued for arrears of the pay, he being only an agent and not having been made a trustee for the civil servant: *Gidley* v. *Lord Palmerston* (1); *Wright & Co.* v. *Mills* (2); *Palmer* v. *Hutchinson* (3); *Kinloch* v. *Secretary of State for India* (4). No action lies for pay of this kind any more than a sailor or soldier can sue for naval or army pay. In an action for the pay of a civil servant no officer or body representing the Crown could be sued, and, therefore, there is no enforceable debt: *Gibson* v. *East India Co.* (5); *Dunn* v. *The Queen* (6); *Mitchell* v. *The Queen* (7); *R. Venkata Rao* v. *Secretary for India* (8). If anyone could be sued it is the government of the province of Bihar and that government is out of the jurisdiction. The pay of a civil servant like Mr. Lucas, like the pay of an officer in the army or navy is not attachable, on principle: *Apthorpe* v. *Apthorpe* (9). *Flarty* v. *Odlum* (10) decided that half-pay cannot be assigned. In *Mulvenna* v. *The Admiralty* (11) Lord Blackburn said that it is an implied condition in all contracts of service with the Crown that the servant shall not be entitled to sue the Crown for his remuneration, and, accordingly, that as the principal debtor could not sue for the sums arrested, the arrestments were incompetent.

Vardy, for Mr. Lucas, adopted the argument of *Danckwerts*.

Gallop, for Mrs. Lucas. If Mr. Lucas was appointed by the

(1) (1822) 3 Bro. & B. 275.
(2) (1890) 63 L. T. 186.
(3) (1881) 6 App. Cas. 619.
(4) (1882) 7 App. Cas. 619.
(5) (1839) 5 Bing. N. C. 262.
(6) [1896] 1 Q. B. 116.
(7) (1890) 6 T. L. R. 181.
(8) [1937] A. C. 248.
(9) (1887) 12 P. D. 192.
(10) (1790) 3 Term Rep. 681.
(11) 1926 S. C. 842.

1943

LUCAS v. LUCAS AND HIGH COMMISSIONER FOR INDIA.

Secretary of State for India in Council his position would be similar to that which appears in *Graham* v. *Public Works Commissioners* (1), where it was held that an action would lie against the commissioners for damages for breach of contract as the commissioners themselves had specially made the contract so that they were liable to be sued on it. It is open to a minister of the Crown to bind himself by a contract whereby the other party offers to serve His Majesty. *Dunn* v. *The Queen* (2) and that class of case have no applicability. The provisions of the Government of India Acts, 1858 and 1915, as amended, show that the Secretary of State makes a contract with a civil servant although the only document regarding the contract is a unilateral covenant by the civil servant. The terms on which an Indian civil servant is appointed are not that he merely offers or undertakes to serve His Majesty during pleasure. He makes a contract with the Secretary of State, the obligation which he assumes thereunder being to render services to the Crown. *Gidley* v. *Lord Palmerston* (3), merely establishes the proposition that, in the absence of a contract, the civil servant serves at will. So far as army pay is concerned, *Mitchell* v. *The Queen* (4) is in point, but there is no authority which goes to the length of saying that an Indian civil servant is, by reason of public policy or any provision of law, engaged to serve on the terms that he shall have no right of action for the pay which is prescribed. There is a considerable difference between an employment of a military character and a civil one: *Mulvenna* v. *The Admiralty* (5), being a Scottish case, is not binding on this court, but it goes far to limit the common law principle that no civil servant can sue for his remuneration. The letter of appointment of an Indian civil servant is an offer by the Secretary of State for India in Council or the Secretary of State to engage the servant to serve His Majesty. A deed is drawn, and the acceptance of the offer is by the receipt by the Secretary of State of the executed covenant.

Cur. adv. vult.

Apr. 16. PILCHER J. (after stating the facts) read the following judgment. The case has been very fully argued before me

(1) [1901] 2 K. B. 781.
(2) [1896] 1 Q. B. 116.
(3) 3 Bro. & B. 275.
(4) 6 T. L. R. 181.
(5) 1926 S. C. 842.

in open court, and a number of points were taken by Mr. Danckwerts who appeared for the High Commissioner for India. In the first instance, he contended that, whatever view might be taken on the legal points which I will refer to later, the High Commissioner for India was not the appropriate official to cite in these proceedings. While denying that garnishee proceedings would lie at all against any official or department in respect of Mr. Lucas's sterling overseas pay, he suggested, without admitting, that, if any official or departmental body was to be joined, it appeared that the Secretary of State for India might be the appropriate minister. Mr. Gallop, who appears for Mrs. Lucas, while he did not in terms admit that he had obtained the garnishee order against the wrong official, was inclined to agree with Mr. Danckwerts that the order would have been more appropriately directed to the Secretary of State for India. That matter is, however, academic, because Mr. Danckwerts stated that he would raise no objection to the formal amendment of the proceedings by the substitution of the Secretary of State for India or any other official or body as garnishee in place of the High Commissioner for India. The case was, accordingly, argued on the basis that the wife's claim to be entitled to garnishee her husband's overseas sterling pay in the hands of any officer of the Crown should not be defeated merely by reason of the fact that the wrong official had been named as garnishee in the proceedings.

Order XLV. deals with garnishee proceedings, and r. 1 of this order empowers the court on ex parte application by a judgment creditor, supported by the necessary evidence that a third person is indebted to the judgment debtor and is within the jurisdiction, to "order that all debts owing or accruing from "such third person (hereinafter called the garnishee) to such "debtor shall be attached to answer the judgment or order." It is, therefore, clear from the wording of the rule that before the machinery of the order can be invoked by the judgment creditor he must establish that there is a debt owing or accruing from the garnishee to the judgment debtor. In this case, therefore, Mrs. Lucas, who seeks to attach her husband's sterling overseas pay, must establish that such pay is, in the words of the rule, a debt owing or accruing from the Crown through the appropriate officer to her husband. There is no question that Mr. Lucas is still employed as an Indian civil servant and is in receipt of overseas sterling pay in England

1943

LUCAS v. LUCAS AND HIGH COMMISSIONER FOR INDIA.

Pilcher J.

and of basic pay in India appropriate to his rank and seniority in the service. I was informed that Mr. Lucas's pay is, in fact, provided from the revenues of the province of Bihar, but for the purposes of this case it is not disputed that he is to be regarded as a civil servant appointed by the Crown and paid out of public funds.

I was referred to all the sections of the Government of India Acts, 1858, 1915, 1919, and 1935, which could have any bearing on the matter under consideration, and also to the rules made under s. 96B of the Government of India Act, 1915, as amended up to 1919. I was also referred to a number of authorities dealing with the position and rights of persons in the service of the Crown. A statement of the circumstances attending Mr. Lucas's appointment to the Indian civil service was handed to me together with a pro forma letter addressed by the India Office to successful candidates in the final examination, and a deed of covenant under seal executed by Mr. Lucas and two members of the Council of India. It was not, I think, seriously disputed by Mr. Gallop that Mr. Lucas's appointment was " during the King's pleasure." There was nothing in the evidence to indicate the contrary, and the deed of covenant to which I have referred recites (inter alia) that " the "Secretary of State in Council has appointed the covenantor," namely, Mr. Lucas, " to serve His Majesty as a member of the "civil service of India . . . . such service to continue during "the pleasure of His Majesty, his heirs and successors." Mr. Lucas was, then, in this respect in the position of an ordinary servant of the Crown. After his appointment Mr. Lucas proceeded to India and took up his duties which he has continued to perform until the present day, receiving in respect of his services the pay provided for by the Superior Civil Service Rules above referred to.

If Mrs. Lucas, the judgment debtor, is to succeed, she must establish that there is " a debt owing or accruing " to her husband from the Crown through some officer or department of the Crown. It is conceded that such a debt can only accrue by virtue of a contract between her husband and the Crown through one of its officers or departments. Mr. Gallop conceded that, unless he could establish such a contract, he must fail. Mr. Danckwerts contended that no contract of employment existed. There is some warrant for saying that the Crown does not contract with persons in its service. In Stephen's Commentaries on the Laws of England, 18th ed.,

vol. iii., p. 250, the following passage occurs: "As a matter "of law the Crown is incapable of entering into a contract "of service binding upon it. Such a contract (if contract it "must be called) is enforceable by the Crown but not against "it; . . . ." Mr. Gallop found some difficulty in spelling out any contract between Mr. Lucas and the Secretary of State for India or any other officer of the Crown. He submitted that the letter of notification from the India Office addressed to Mr. Lucas constituted an offer by the Secretary of State for India to engage Mr. Lucas to serve His Majesty and that Mr. Lucas accepted this offer by signing the deed of covenant to which I have already referred. If Mr. Lucas had been called on to give the particulars of the arrangement between him and the Secretary of State for India which he relied on as constituting a contract, I think that the alleged contract might have been pleaded in a number of ways besides that suggested by Mr. Gallop. Mr. Lucas was appointed to serve His Majesty in the Indian civil service, the salary which he was to receive was laid down, and the employment was to continue during the King's pleasure. Mr. Lucas has served as an Indian civil servant for some fourteen years, and in the circumstances I think that it would be difficult to say that the Crown through its appropriate officer did not enter into a contract of service in the ordinary sense of the word with Mr. Lucas. The matter is, however, in my view, quite academic, because the real point here is not whether there was a contract of service in the ordinary sense of the word, but whether the contract was enforceable at law by Mr. Lucas against the Crown or its appropriate officer.

I understand that Mr. Lucas receives his "sterling overseas "pay" in this country monthly in arrear. The High Commissioner for India is appointed as the appropriate official in this country for disbursing sterling overseas pay in this country to members of the Indian civil service. He acts as a conduit pipe. The real point for decision in this case is this. If for any reason Mr. Lucas, while continuing to hold his appointment in the Indian civil service and to discharge his duties, failed to receive the salary appropriate to his rank, or any salary, could he maintain an action in respect of the salary so unpaid against the Crown through its appropriate officer? If no such action could successfully be maintained by Mr. Lucas, it cannot be successfully argued by his wife that this is, even in the words of Or. XLV., r. 1, a debt owing or

1943

LUCAS v. LUCAS AND HIGH COMMISSIONER FOR INDIA.

Pilcher J.

accruing from the Crown through the appropriate officer to Mr. Lucas in respect of salary unpaid. While a study of the material sections of the various Government of India Acts might leave an Indian civil servant who was minded to take action against the Crown in respect of salary unpaid in very considerable doubt as to the appropriate officer to name as a defendant, there is, in my view, nothing in any of those Acts which lends any colour to the suggestion that Indian civil servants have been placed in a more privileged position than other servants of the Crown in respect of rights of action arising out of their appointment or their conditions of service against the Crown through its appropriate officer or department. While it would, no doubt, be competent to His Majesty by appropriate legislation to confer on his servant a right of action against his appropriate minister or department, the conference of such a right would be unusual, and one would expect to find it provided for in the most explicit terms. To discuss the sections of the Acts to which I was referred would merely be tedious, and it is sufficient for me to say that, in my view, the position of Mr. Lucas and other members of the Indian civil service in regard to actions against the Crown or its appropriate officer arising out of their employment as servants of His Majesty is quite unaffected by the various provisions of the Government of India Act.

It is well recognized that, except in some instances where the matter is expressly dealt with by statute, servants of the Crown hold their office during His Majesty's pleasure, and it is quite clear that Mr. Lucas's appointment was subject to this condition. It follows that no claim for damages in respect of wrongful dismissal will lie at the suit of such a servant against the Crown or any officer of the Crown. This point is well exemplified in *Dunn* v. *The Queen* (1). In that case the suppliant was presenting a petition of right, his case being that the governor-general for the Niger protectorate, acting on behalf of the Crown, had engaged him as consular agent for a period of three years certain and that he had been dismissed before the expiration of the three years. Day J. directed the jury to return a verdict for the Crown on the ground that contracts for the service of the Crown were determinable at the pleasure of the Crown. On application being made for a new trial on the ground of misdirection, the Court of Appeal upheld the judge's direction. The grounds

(1) [1896] 1 Q. B. 116.

of this decision of the Court of Appeal were that there must be imported into all contracts of employment made on behalf of the Crown the term that the Crown may put an end to the employment at its pleasure. It is interesting to note that Mr. Dunn later sued the governor-general in *Dunn* v. *McDonald* (1) for breach of warranty of authority. This action also failed. The plaintiff appealed, and his appeal was dismissed on the ground that a public officer cannot be made personally liable for acts done by him in his public character. I refer to *Dunn* v. *The Queen* (2), not because it established any new proposition, but merely because it affords a good example of a whole line of cases of the same character. *Gould* v. *Stuart* (3), a decision of the Privy Council, lays down the same proposition, namely, that the Crown has power to dismiss its servant at pleasure whether the employment of the servant be of a civil or of a military character, and whether he is employed in this country or in a colony, unless there is some express statutory enactment governing the terms of employment of the servant which provides to the contrary. In that case the plaintiff succeeded, because it was held that certain provisions of the New South Wales Civil Service Act, 1884, were inconsistent with any implied term that the employment of the plaintiff was determinable at the King's pleasure. In *Denning* v. *Secretary of State for India in Council* (4), Bailhache J., following *Dunn* v. *The Queen* (2) and other cases in the same line of authorities, held that the plaintiff, who had been engaged by a contract which provided that he should be employed for five years certain and had been dismissed on medical grounds before the expiration of the five years, was not entitled to recover damages for wrongful dismissal.

All the above authorities which deal with actions for wrongful dismissal appear to have been decided on the ground that the Crown servant's appointment or contract of employment, even though it may have been expressed to be for a period of years, was subject to the overriding right of the Crown to terminate the service, and, consequently, the right to salary, at pleasure. In the present case it cannot be, and is not, contended that any debt owing or accruing within the meaning of Or. XLV., r. 1, could arise as a result of proceedings established by petition of right against the Crown, but it is

(1) [1897] 1 Q. B. 555.
(2) [1896] 1 Q. B. 116.
(3) [1896] A. C. 575.
(4) (1920) 37 T. L. R. 138.

1943

LUCAS v. LUCAS AND HIGH COMMISSIONER FOR INDIA.

Pilcher J.

submitted by Mr. Gallop that the decisions to which I have referred do not affect the right of a servant of the Crown successfully to prosecute proceedings against the appropriate officer or department of the Crown in respect of salary actually earned and unpaid so as to create a debt due or accruing due from the appropriate officer or department to the servant. Mr. Lucas's right successfully to maintain such an action is not, as I have said, enlarged by any provisions of the Government of India Acts, and it must be assumed that he would bring his action against the officer of the Crown acting in his official and not in his personal capacity. Can such an action be successfully maintained? I am quite clear that it cannot. In *Gidley* v. *Lord Palmerston* (1), the executors of one Holland, a retired War Office clerk, brought an action in assumpsit against Lord Palmerston in his official capacity as Secretary for War. The action was to recover certain deductions which had, during the last years of Holland's life, been made for the benefit of his creditors from the retired allowance or pension which he would otherwise have received. It was not disputed that a sum representing Holland's full pension had at the material time been at the disposition of the defendant for the payment to Holland of the full retired allowance. In giving judgment Dallas C.J. used these words (1): "... it will "be sufficient to advert to a class of cases, too well known and "established to be more particularly mentioned, and which in "substance and result, have established, that an action will "not lie against a public agent for anything done by him in his "public character or employment, though alleged to be, in "the particular instance, a breach of such employment, and "constituting a particular and personal liability ..." Later in his judgment he says (1): "... on principles "of public policy, an action will not lie against persons acting "in a public character and situation, which, from their very "nature, would expose them to an infinite multiplicity of "actions, that is, to actions at the instance of any person who "might consider himself aggrieved." It will thus be seen that in 1822 it was well established on grounds of public policy that actions by servants of the Crown would not lie against ministers or officers of the Crown in respect of acts done in an official capacity by those ministers or officers. In *Mulvenna* v. *The Admiralty* (2), heard by the Court of Session in Scotland in 1926, the facts were that the wife of a dockyard worker

(1) 3 Bro. & B. 275, 286, 287. (2) 1926 S. C. 842, 859, 860.

at His Majesty's dockyard at Rosyth had obtained from the appropriate Scottish tribunal a separation order against her husband and also an order for the payment by him of 25*s.* a week for the maintenance of herself and the child of the marriage, and costs. The husband fell into arrears with the payments in respect of maintenance and failed to pay all the costs. The wife, accordingly, brought an action of furthcoming against the Lords Commissioners of the Admiralty for the arrestment, or, as we should say, the attachment, of wages due by the Admiralty to her husband. An order was made attaching the husband's wages. The matter came before the Lord Ordinary, and the Lords Commissioners of the Admiralty put in a number of pleas. The Lord Ordinary sustained the fourth plea in law of the defenders, which was, in effect, that the wages of the husband were not arrestable on the ground that the husband was a servant of the Crown and that his pay was intended for his maintenance as a public servant and was provided by the Crown for that purpose. The wife appealed unsuccessfully to the Court of Session. Lord Sands and Lord Ashmore affirmed the interlocutor of the Lord Ordinary on the same grounds as those given by the Lord Ordinary. Lord Blackburn, after stating his view that "in a question of this sort, there is no room for any difference "between the laws of England and the laws of Scotland," reviewed *Dunn* v. *The Queen* (1) and other English cases, and said: "These authorities deal only with the power of "the Crown to dismiss a public servant, but they appear to "me to establish conclusively certain important points. The "first is that the terms of service of a public servant are subject "to certain qualifications dictated by public policy, no matter "to what service the servant may belong, whether it be naval, "military, or civil, and no matter what position he holds in "the service, whether exalted or humble. It is enough "that the servant is a public servant, and that public policy, "no matter on what ground it is based, demands the qualifica- "tion. The next is that these qualifications are to be implied "in the engagement of a public servant, no matter whether "they have been referred to when the engagement was made "or not. If these conclusions are justified by the authorities "to which I have referred, then it would seem to follow that "the rule based upon public policy which has been enforced "against military servants of the Crown, and which prevents

(1) [1896] 1 Q. B. 116.

1943

LUCAS v. LUCAS AND HIGH COMMISSIONER FOR INDIA.

Pilcher J.

"such servants suing the Crown for their pay on the assumption "that their only claim is on the bounty of the Crown and not "for a contractual debt, must equally apply to every public "servant: see *Leaman* v. *The King* (1), *Smith* v. *Lord* "*Advocate* (2), and other cases there referred to. It also "follows that this qualification must be read, as an implied "condition, into every contract between the Crown and a "public servant, with the effect that, in terms of their contract, "they have no right to their remuneration which can be "enforced in a civil court of justice, and that their only remedy "under their contract lies 'in an appeal of an official or "'political kind.' If this is the true conception of a contract "between the Crown and a public servant, then the answer "to the question in this case is simple, for the arrestment of a "sum to which the debtor had no claim which he could enforce "in a court of law is clearly inept. It further appears to me that, "if this conception of the effect of public policy on the contract "itself had been developed earlier, it would have led to the same "conclusions in the numerous cases to which the Lord Ordinary "has referred as were reached on different and, in some cases, "on somewhat unsatisfying grounds. It would also have "avoided the necessity for several statutory provisions "applicable to the pay of particular services which must now "be regarded as merely declaratory of the common law."

These words of Lord Blackburn were used in a case the facts of which were curiously similar to the case now before me. While the decision in *Mulvenna* v. *The Admiralty* (3) is not binding on me, it is, of course, to be treated with great respect. The majority of the court decided the case on grounds rather different from those given by Lord Blackburn. It is, perhaps, sufficient for me to say that Lord Blackburn's view of the effect of the English authorities commends itself to me, and I respectfully adopt it. I am satisfied that the rule of public policy to which Lord Blackburn refers would prevent Mr. Lucas from successfully prosecuting any action against any officer of the Crown in respect of unpaid salary. There can, therefore, never be any "debt owing or accruing" from such an officer to Mr. Lucas which can be attached by his wife under the machinery provided by Or. XLV. The garnishee order nisi will, therefore, be discharged.

Order nisi discharged.

(1) [1920] 3 K. B. 663.
(2) (1897) 25 R. 112.
(3) 1926 S. C. 842.

Solicitor for High Commissioner : *Solicitor, India Office.*
Solicitors for Mr. Lucas : *James Brodie & Co.*
Solicitors for Mrs. Lucas : *Kenneth Brown, Baker, Baker.*

T. A. H.

1943

LUCAS *v.* LUCAS AND HIGH COMMISSIONER FOR INDIA.

THE EMPIRE ANTELOPE. THE RADCHURCH.

1943
Mar. 30, 31 ; *Apr.* 1 ; *June* 2.

Shipping—Inquiry into conduct of certificated officer—Charge—Particularity—Finding—Need to state reasons—Unfitness to discharge duties from incompetency—Evidence—Sufficiency of isolated act of neglect or default—Costs—Power of Divisional Court to deal with costs of tribunal making inquiry—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 471, *sub-ss.* 1, 2, 3.

The masters of two British ships appealed against the suspension of their certificates on the ground of incompetency by tribunals of inquiry appointed under s. 471 of the Merchant Shipping Act, 1894, by the Minister of War Transport. The main ground of the suspension in each case was that during a submarine attack on a convoy the master ordered or allowed his ship to be abandoned without sufficient reason. Both the masters and their officers thought that their ships had twice been struck by torpedoes. In fact, neither ship had been actually struck, but both had received some damage from torpedoes exploding very close to them. The ships were carrying cargoes of iron ore and steel which rendered them liable to sink very rapidly in the event of holing :—

Held, (1.) that the masters were fully justified in ordering the crews to take to the boats, and that there was no justification for the findings that the masters were "from incompetency" unfit to discharge their duties ; (2.) that the Divisional Court had power to deal with the costs in the courts below as well as with the costs of the appeal.

A condition of unfitness from incompetency implies a certain element of duration, and, although conduct on a particular occasion may be such as to lead to the conclusion of incompetency, the circumstances must be quite exceptional to justify such a finding against a master with an unimpeachable record in relation solely to an isolated incident.

It is desirable that, in proceedings under s. 471, sub-s. 3, of the Act, the nature of the incompetency or of the misconduct alleged should be stated with reasonable particularity and a reasonable time before the hearing, and further that the tribunal should state their findings in such a way that both the master and the minister may know the reasons for the decision.

1943

THE EMPIRE ANTELOPE. THE RADCHURCH.

APPEALS by masters of British ships against the findings of tribunals of inquiry appointed by the Minister of War Transport (in whom are vested for the duration of the war the functions of the Board of Trade) by virtue of s. 471 of the Merchant Shipping Act, 1894. In each case the tribunal found that the master was from incompetency unfit to discharge his duties and suspended his certificate for a stated period.

In the case of the master of the *Empire Antelope*, the inquiry was held by a person appointed by the minister. In the case of the master of the *Radchurch*, the inquiry was heard by a local marine board. In both cases the tribunal was assisted by a stipendiary magistrate.

Both ships were sailing in the same convoy which was subjected to severe attack by enemy submarines. The substance of the allegations against each master was that he ordered or allowed his ship to be abandoned without sufficient reason. The master of the *Empire Antelope* had held a master's certificate for thirty-five years and was about to retire after the end of the voyage in question. Before the attack he had been appointed vice-commodore of the convoy and for the subsequent part of the homeward voyage he was made commodore. After the conclusion of the voyage his company wrote a letter, saying that they had been asked to send in recommendations for merchant navy honours and awards in the cases of officers and men who "have given long and "meritorious sea service and since the outbreak of war have "been continuously employed at sea in dangerous waters," and adding that they were of opinion that he had a special claim in this respect.

On the occasion of the attack on the convoy the commodore ship was seen to receive a direct hit from a torpedo. She sank shortly afterwards. The *Empire Antelope* was about six cables from the commodore ship, and felt only a slight shock. About fifteen minutes later, other ships having been hit meanwhile, the *Empire Antelope*, which was loaded to her marks with a cargo including over 4700 tons of steel, was shaken by a violent explosion. This was followed about two minutes later by another explosion which was not quite so severe. The hull was undamaged, but the shock was sufficiently severe to break an oil pipe in the engine room and to damage a bulk-head. Both the master and the second officer, however, thought that the ship had been hit by a torpedo in way of No. 2 hold. The master ordered the second officer to get the

1943

THE EMPIRE ANTELOPE. THE RADCHURCH.

ship's company to the boats at once, and the engines were stopped. The master then went down to his room to make sure that a cadet was not left there. As he got to his room the second explosion occurred. At that moment the second officer had left the bridge, but, before leaving, he had blown seven short blasts on the whistle, which he said was the peace-time signal in that ship for abandoning ship. By that time, which the second officer put at about six minutes after the first explosion, all the boats were in the water and the two port boats were away. Four men were in the water, but were afterwards picked up. The master, who was the last to leave the ship, was knocked off the life line by the sea and was not picked up by his own boat until he had been in the water about twenty minutes. As he was unable to swim he was then in a semi-conscious condition. As soon as he came to and had looked at the ship, he came to the conclusion that she did not seem to be going down and ordered the boat not to go far away. A little later he asked for volunteers to go back to the ship. The whole boat's crew volunteered and the master was the first to board the ship, followed by the boat's crew. The other boats then returned and after the damage in the engine room had been repaired the *Empire Antelope* rejoined the convoy and the master was appointed commodore for the rest of the voyage.

In the case of the *Radchurch* the master had held his certificate as master for just over a year. He had had twenty-two years' experience at sea in various capacities as deck officer, and for the last eight years had been employed by J. & C. Harrison. He had been serving continuously at sea since the outbreak of the war until December, 1941, when he was given sick leave on account of his nervous condition. He remained on leave until July, 1942, when he was given command of the *Radchurch* as relieving master. The *Radchurch* was laden with 5350 tons of iron ore. Her complement included European officers, while the crew was composed of Portuguese, West Indian and West African negroes. When the convoy was attacked a ship in the port column next to the *Radchurch* was torpedoed and sunk and other ships in her vicinity were hit. The alarm bell was sounded and shortly afterwards a heavy concussion was felt which violently shook the ship. All the officers who were called before the board swore that they thought the ship had been torpedoed. Some of these officers had had previous experience of being

1943

THE EMPIRE ANTELOPE. THE RADCHURCH.

torpedoed. The master saw smoke on the portside of the bridge and he noticed that the hatches of No. 1 hatch had been displaced. He at once told the second officer to tell the crew to get the boats away, and pulled the whistle lanyard giving two series of six short blasts. He intended this signal to indicate to the escort that his ship had had an attack on his port side. The master said that he intended to order the boats to be manned and launched and that his crew should leave the ship. Shortly afterwards a second explosion occurred which shook the ship fore and aft. The master and all his officers and the crew thought that she had been hit by a second torpedo. Up to this time the master had remained on the bridge, but when the second explosion occurred he went down to his room, collected the ship's accounts and some papers, and brought them up to the bridge. He had a steel box in the chart room in which he kept his secret routeing and Admiralty instructions. He left these secret papers in the box, thinking that they would go down with the ship. The boat in which the master got away was overcrowded, and the master and some others swam to another boat which took him on board and ultimately reached an escort ship in the convoy. Immediately the master reached the escort ship he asked to see the commander, as he wished to get back to his ship which he saw was still afloat and collect the secret papers that he had left behind. The commander, however, declined to allow the master to do so and said he was going to send a boarding party to the *Radchurch*. The master asked to be included in the boarding party, but this request was refused. A boarding party then went to the ship. No serious superficial damage was found, but the bilges were not sounded. The boarding party then came back to the escort vessel and the master tried to persuade his crew to go back to the ship. The officers were willing to do so, but the crew were not. Attempts were made to get together a volunteer crew made up of various men who had been rescued from other torpedoed ships and had been taken on board the escort vessel, but the escort vessel was ordered to rejoin the convoy because of further enemy action, and the *Radchurch* was left afloat with no one on board.

Hayward K.C. and *Gething* for the appellants.
Owen Bateson for the respondent.
The cases both in the tribunals below and in the Divisional

Court were heard in camera. The arguments, which were mainly directed to the question of " incompetency," sufficiently appear from the judgment, which was delivered in open court.

Cur. adv. vult.

June 2. The judgment of the court (LORD MERRIMAN P. and BUCKNILL J.) was read by

LORD MERRIMAN P. Section 471 of the Merchant Shipping Act, 1894, read by itself might appear simply to enable the tribunal to report to the minister, but it has been decided by the Court of Session (see *Board of Trade* v. *Leith Marine Board* (1)) that a local marine board appointed to hold an inquiry under s. 471 is a " court " within the meaning of s. 470, sub-s. 1 (*b*), and has the power to order the cancellation or suspension of a certificate. There appears to be no reason for drawing any distinction in this respect between a local marine board and a person appointed by the minister to hold the inquiry.

Before dealing with the merits, we think it desirable to make some observations with regard to procedure. In addition to the choice of alternative tribunals already mentioned, s. 471 also provides that, in the case of there being no convenient local marine board or one willing to hold the inquiry, the minister may direct the inquiry to be heard before a court of summary jurisdiction. In this event s. 471, sub-s. 4, lays down that the inquiry "shall be conducted and the results "reported in the same manner, and the court shall have the "like powers as in the case of a formal investigation into a "shipping casualty under this part of this Act." This provision brings in the Shipping Casualties and Appeals and Re-Hearings Rules, 1923 (St. R. & O., 1923, No. 752), which lay down the procedure to be followed on the usual lines of the judicial investigation of charges. In particular r. 3, coupled with the appendix, part 1, provides for giving full and proper notice of the nature of the investigation including the specific questions which, subject to the power of amendment provided by r. 11, it is proposed to submit for decision. These rules do not apply when the inquiry is held by a local marine board or by a " person appointed." In these cases s. 471, sub-s. 3, governs the procedure. In view of this distinction, which appears to be deliberate, we feel that it is impossible to lay down that

(1) (1896) 24 R. 177.

1943

THE EMPIRE ANTELOPE. THE RADCHURCH.

the procedure indicated in the rules must be followed when the inquiry is held either by a "person appointed" or by a local marine board. At the same time it must always be remembered, as was said in *Reg.* v. *Collingridge* (1), that proceedings of this kind are penal, if not criminal. The consequences to the officer concerned are equally serious whether the matter is dealt with under s. 471 or under s. 470. Indeed, the very absence of formality makes it the more essential that justice should not merely be done, but that it should appear to be done. In our opinion, it is eminently desirable that in proceedings under s. 471, sub-s. 3, the nature of the incompetency or of the misconduct as the case may be, by reason of which unfitness to discharge his duties is alleged against a master should be stated with reasonable particularity and a reasonable time before the hearing. In neither of these cases was the nature of the charge stated with any particularity. In each case it was simply alleged that, on or about the date in question, while acting as master of the ship in question, the master was unfit to discharge his duties owing to incompetency. We shall have something to say about the propriety of making such a charge in relation to the actual circumstances of the case. For the moment we are concerned to point out that, if the substantive charge that the master had caused the abandonment of his ship by his wrongful act or default had been made under s. 471, sub-s. 1 (*a*), the procedure laid down by the rules would have been obligatory.

Again, without imposing any particular formality which is not prescribed by the statute, we also think it essential that the tribunal should state their findings in such a way that both the master and the minister may know the reasons for the decision. This was done in the case of the *Empire Antelope*. In the *Radchurch* the formal finding merely states that the tribunal found the charge proved, while from certain remarks addressed by the chairman to the master at the time of the decision it appears that the tribunal thought that he had "done certain things which they did not think right," but without giving any definite indication what these things were.

It is vital to bear in mind that the issue under s. 471, sub-s. 1, is whether it is established affirmatively that the master from incompetency or misconduct is unfit to discharge his duties. Such a finding necessarily imports a state or condition of unfitness. The same implication is inherent in the word

(1) (1864) 34 L. J. (Q. B.) 9.

1943

THE EMPIRE ANTELOPE. THE RADCHURCH.

"incompetency," which we interpret in the dictionary sense as the quality or condition of not having "adequate ability "or fitness" or "the requisite capacity or qualifications." Manifestly, incompetency and unfitness to discharge duties, though they may be the same thing, are not necessarily so. Unfitness to discharge duties may result, for example, from temporary ill-health, without any question of incompetency arising. The important point is that neither unfitness to discharge duties nor incompetency is the same thing as an isolated instance of neglect or default. This distinction is plainly drawn in the wording of s. 470, sub-s. 1 (*b*), which gives the court power to cancel a certificate "if they find that he *is* "incompetent or *has been* guilty of any gross act or misconduct, "drunkenness or tyranny." It is, no doubt, true that conduct on a particular occasion may be such as to lead to the conclusion of incompetency and so of unfitness to discharge the duties of his rank. Such conduct may be evidence of, but is not the equivalent of, incompetency or unfitness to discharge duties. The allegation that the master "*was* on a certain date from "incompetency unfit to discharge his duties" involves the misconception that the particular incident and incompetency or unfitness to discharge his duties are interchangeable terms. In our opinion, the circumstances must be quite exceptional to justify a finding of unfitness to discharge his duties by reason of incompetency against a master with an unimpeachable record in relation solely to an isolated incident. On the other hand, where deficiency in technical qualifications is proved, the state of incompetency necessarily continues until by further experience or training the deficiency has been overcome. Incompetency, however, need not necessarily consist in the lack of technical qualifications. Moral qualifications necessary for a position of responsibility may be lacking, and we do not exclude the possibility that incompetency may result if these qualities are lacking for the time being, and even without any element of blame attaching to the officer. More especially may this be so in the case of men subjected to the constant strain of command in war conditions at sea. Nevertheless, it remains true that what has to be established against the master is a state or condition of unfitness from incompetency, and that implies a certain element of duration. It is only right to add that in neither of these cases was there the slightest suggestion of intemperance as a cause of incompetency.

Dealing still in general terms with the incidents in question,

1943

THE EMPIRE ANTELOPE. THE RADCHURCH.

these ships were carrying iron ore and steel respectively, both of which cargoes render a ship liable to sink very rapidly, in the event of holing. This is recognized by Admiralty regulations for the safety of crews in a "memorandum to ship "owners and shipmasters. Ships carrying full cargoes of ore "or steel" [M.D. Memo. 3279]. We were also shown certain Admiralty Merchant Shipping Instructions headed: "Notes "on the abandonment of merchant vessels." (Incidentally, it was not clear whether these instructions were issued before or after the events in question.) They begin with the statement that during recent months cases of premature abandonment have occurred, and the following passages are in point:

"1. It is recognized that the decision to abandon ship "rests entirely with the master, whose duty it is to assess all "the circumstances at the time of attack." "1. [*sic*] While "the master's concern to preserve the lives of the ship's "personnel is fully appreciated, it has happened that, in his "desire to get the boats away, the master has failed to take "into account the ability of his ship to remain afloat either "by virtue of adequate bulk-heading or . . . ." [Then follow detailed observations on the ability of ships to remain afloat.] . . . . "4. (v.) Ships' lifeboats have left the ship "before the entire crews have been embarked, or before the "actual 'abandon ship' order has been given. Masters "should ensure that the 'emergency' signal is distinct from, "and cannot be confused with, the 'abandon ship' order, "and that their crews are fully aware of the difference "between them and the action they should take when the "'emergency' signal is given. On several occasions in bad "weather, ships' crews have taken to the lifeboats when they "would have been safer on board. (In some of these instances "the ship sustained no damage at all.) (vi.) In the confusion "caused as a result of torpedo or bomb attack, the master "may sometimes decide to abandon ship before he has had an "opportunity to assess the extent of the damage. In such "cases, it cannot be too strongly urged that the boats should "remain in the vicinity of the vessel so that she may be "reboarded if her apparent condition should give cause for "hope that the ship may be saved and eventually brought "into port. If circumstances justify it, a skeleton crew should "remain on board to man pumps or take other necessary "emergency action. Fires can often be successfully dealt with "if tackled vigorously in their early stages." In both cases it

1943

THE EMPIRE ANTELOPE. THE RADCHURCH.

was made a ground of complaint that the ship was abandoned without any examination of the extent of the damage. The instructions quoted make it clear that this is a matter for the judgment of the master. A mere error of judgment in making such a decision, as contrasted with a surrender of judgment due to panic, cannot be regarded as misconduct, still less as incompetency: *Brown* v. *Board of Trade* (1).

The principal question is whether there was anything culpable in the decision of the master of the *Empire Antelope* to get the ship's crew into the boats. We are strongly of opinion that not only was this decision not culpable, but that the master would have been wrong to take any other decision. All the evidence tends to show that not merely the master but every other witness was convinced that the ship had been hit not once but twice. It is clear now that she had not received a direct contact hit, but the information and advice given to us showed that a ship may receive most serious damage from the explosion of a torpedo underneath the bottom without actual contact. It appears that the court considered that the *Empire Antelope* should not have been abandoned before some proper steps had been taken to verify the belief that she had been struck by a torpedo, and it is pointed out that the vessel at no time showed a list, but kept perfectly upright and that no sheet of water, flame or even smoke was noticed at the time of either of the two explosions, "which fact should have conveyed to the mind of the master "that the concussions which his vessel had experienced were "probably caused by torpedoes hitting other ships in his "near vicinity." We do not regard this reasoning as satisfactory. The finding that the master was incompetent because he did not take steps to verify the belief that the ship herself had been struck appears to us to be quite inconsistent with instruction No. 4 (vi.) already quoted. If it was a reasonable inference that the ship had either received a direct hit or that an under-water explosion had taken place close enough to hole her bottom, we are strongly of opinion that, having regard to the nature of the cargo, the master would not have been justified in any delay before getting all hands safely away in the first instance, while standing by to reboard if the original inference should prove to be unfounded. The only possible criticism relates to the actual signal for abandoning ship, about which there is a conflict between the master

(1) (1890) 18 R. 293, 294.

1943

THE EMPIRE ANTELOPE. THE RADCHURCH.

and the second officer. Not having seen the witnesses ourselves we are prepared to assume the correctness of the finding in favour of the second officer's version, as follows:

"After the engines were stopped the master told the second "officer to go to his boat, and as he turned to go the master "said to him: 'Have you sounded the signal to abandon "'ship?' The second officer replied: 'No,' and then the "master (in the second officer's language) told him to: "'Sound the signal so that the men would know what we "'were doing.'"

The court also criticized the master because they were "satisfied that proper lists giving the emergency signals "were not posted in the *Empire Antelope* so as to enable "every member of the crew to become conversant with them, "and, in the opinion of the court, the absence of these lists "would certainly contribute to confusion and misunder-"standing on the part of those on board the ship at a time of "emergency." Even so, it is only fair to the master to observe that the chief officer, with whom, as executive officer, the master confirmed the existing arrangements about emergency signals, was not called. The master himself gave his reasons for saying that neither in this ship nor in any other had he ever arranged a whistle signal for abandoning ship. The fact remains that on these findings there was a lack of clarity about the emergency signals and that the second officer blew what he believed to be the pre-arranged signal for abandoning ship and did so on the orders of the master, who is, therefore, responsible for the fact that the boats, in the manning of which there was exemplary expedition and lack of confusion, were lowered and got away before there was time for the second officer or the master himself to get into them. It seems to us, however, that there was no justification for the finding that this master was from incompetency unfit to discharge his duties; still less for the infliction of the serious penalty of the suspension of his certificate.

In the case of the *Radchurch*, the formal finding of the marine board was merely that the board found the charge of incompetency proved, suspended the certificate for nine months, and recommended the grant of a certificate as first mate during the period of suspension. When the chairman read out the findings he made certain remarks in the course of which he said: "In making the recommendation which "we are making as to your certificate we feel that you were

"probably suffering from some degree of shock before the "beginning of this voyage at all which caused you to do "things which we do not think were right. We cannot "blame you for that shock, but the fact remains that things "we do not think right did happen, and one of our objects is "to keep you from having to go away as a master for a while, "because we just do not think at the moment it is good for "you to have to do it again" (1). We conclude from these remarks that the board considered that the master's state of health caused him to order the ship to be prematurely abandoned, and that at the time of the inquiry he was still unfit by reason of his state of health to perform the duties of a master. The evidence is overwhelming that those on board thought the ship had been torpedoed, and we consider that the master on the evidence which was then available to him, was justified in giving the order for the crew to get into the boats as and when he did. There does not appear to us to be any evidence which would support a conclusion that he lost his head or became panic stricken, nor, indeed, has there been any finding to that effect by the board. The fact that he forgot to do everything which he might have done if he had had plenty of time to think about it, may conceivably be a matter for adverse comment on his conduct on this particular and difficult occasion, but, in our opinion, there is nothing in his behaviour which justifies the finding of the board that he was and is unfit to perform his duties as master owing to incompetency.

Counsel for the Ministry argued that the master ought to have made an examination of the ship before ordering the crew to leave, and, in particular, ought to have taken

(1) Reporter's note. Since the hearing of these appeals, by St. R. & O., 1943, No. 586, an "Order adding regulation 47 (CA) "to the Defence (General) Regu- "lations, 1939," it is provided by reg. (2) that "Any court having "power under s. 470 of the "Merchant Shipping Act, 1894, "to cancel or suspend the certifi- "cate of a certificated officer by "reason of any act or omission "on his part or of his incom- "petency shall, if satisfied that "the act or omission or the "incompetency is to be attributed "to the effects on the officer of "performing his duties under war "conditions and that these effects "are of a temporary nature, ... "have power, in lieu of cancelling "or suspending the certificate, to "direct that for such period as "may be specified in the direc- "tion the officer shall not be em- "ployed or engaged, or shall not "be employed or engaged in a "capacity so specified on board "any ship."

1943

THE EMPIRE ANTELOPE. THE RADCHURCH.

soundings of the bilges. Incidentally, the boarding party took no soundings of the bilges, but apart from this, if the ship had been struck by two torpedoes one forward and one aft, as the master believed, she might founder very suddenly, and we are advised and consider that the master, having such a belief, was justified in ordering the crew into the boats without first directing soundings of the bilges and double tanks to be made. It was also argued that, even if the master was justified in giving the order to leave the ship at the first serious explosion, he could and should have cancelled the order when he found that the ship was not apparently making water seriously during the half hour that elapsed between the first explosion and the time when he and the crew were away. Here again, however, we are advised and consider that such a cancellation of the order would not have been justified, as the ship might suddenly start to sink rapidly if the cargo which at first blocked the incursion of water suddenly ceased to do so.

Gething. I ask that the appeals be allowed with costs, including the costs of the inquiries below. The appellate court must have power to deal with these costs, for, supposing a master, in addition to having his certificate suspended, has been ordered to pay a sum towards the costs of the inquiry, it would be absurd if this court could not reverse such a finding. A Divisional Court, like any other appellate court, can deal with the costs below. It is true that r. 20 (*i*) of the Shipping Casualties and Appeals Rules, 1923, provides that "the Court of Appeal shall have power to make such order "as to the whole or any part of the costs of and occasioned by "the appeal as the court may think just," but r. 20 (*j*) provides that "subject to the foregoing provision of this rule, every "appeal shall be conducted under and in accordance with "the general rules and regulations applicable to ordinary "proceedings before the Court of Appeal."

Bateson. This court is limited by the words of r. 20 (*i*) "the costs of and occasioned by the appeal," and there does not appear to be any reported cases in which the appellate court has dealt with any costs other than those of the appeal. [The President referred to R. S. C., Or. LVIII., r. 4.] There may be power to set aside an order that an officer contribute so much towards the costs, but not to award costs.

1943

THE EMPIRE ANTELOPE. THE RADCHURCH.

LORD MERRIMAN P. We think we have power to make the order asked for, and the order will be that these two appeals be allowed with costs here and in the courts below, and they will be taxed by the officer who taxes the costs of an appeal under the Shipping Casualties and Appeals Rules.

Solicitors for appellants: *Ingledew, Brown, Bennison & Garrett, for* (in the case of the *Empire Antelope*) *Miller, Taylor & Holmes, Liverpool.*

Solicitor for respondent: *Treasury Solicitor.*

E. C. M. T.

KING *v.* KING.

C. A.

1943

June 22; July 7.

Divorce—Costs—Wife's costs—Security—Appeal by husband against dismissal of petition.

The court has jurisdiction to order a husband to give security for the costs of his wife in an appeal by him against the dismissal by a judge of the Divorce Court of a petition for divorce brought by him against his wife, and the court will do so in appropriate circumstances. Security will not be ordered as a matter of course merely because the wife has no means of her own for financing her costs of the appeal.

MOTION by wife for security for her costs of her husband's appeal.

The husband having petitioned for divorce on the ground of his wife's adultery, Henn Collins J. dismissed the petition, with costs, on the ground that the wife had not committed adultery with the co-respondent. The husband appealed to the Court of Appeal. In the court below security for the wife's costs had been ordered, and she now moved for an order for security for her costs of the appeal. In an affidavit sworn by her she stated that she was without means to finance her costs of the appeal.

Serjeant Sullivan K.C. and *Willett* for the wife. The general principles regarding the wife's costs in matrimonial suits are as applicable to appeals as to the original proceedings in the Divorce Court. The protection of the marriage status is an interest of the State which is concerned to secure that divorce litigation is efficiently conducted. The court, therefore, is

C. A. 1943

KING v. KING.

entitled to all the assistance possible in determining such matters, and, if the husband desires to have reversed the decision of the judge below, it is his duty to see that the wife's case is adequately placed before the Court of Appeal by professional and skilled advisers. Furthermore, the court will give effect to the right of the wife to pledge her husband's credit for the costs of matrimonial proceedings as being necessaries. In *Shufflebotham* v. *Shufflebotham* (1), where the wife petitioned and there had been a decree nisi dissolving the marriage, the Court of Appeal refused to order a stay of the husband's appeal until he had given security for the wife's costs, but the attention of the court was not drawn to the decision of a full Court of Appeal in *Vidal* v. *Vidal* (2), ordering security to be given for the wife's costs of an appeal. *Vidal* v. *Vidal* (2) is authority for saying that the Court of Appeal has jurisdiction in a proper case to order such security to be given. The closing words of s. 32 of the Supreme Court of Judicature (Consolidation) Act, 1925, indicate that where no special provision is contained in the Act or in rules of court with reference to procedure and practice, jurisdiction shall be exercised by the Court of Appeal "as nearly as may be in "the same manner as that in which it might have been "exercised by the court to which it formerly appertained." That enables the court to accede to this motion.

Victor Russell for the husband. It had been intended to rely on the decision in *Shufflebotham* v. *Shufflebotham* (1), which was based on the ground that the Court of Appeal had no jurisdiction to order security for the wife's costs, but in view of the earlier decision in *Vidal* v. *Vidal* (2) it is impossible to contend that this court has no jurisdiction.

SCOTT L.J. The motion will be granted, and the court will give the reasons for its decision at a later date.

July 7. SCOTT L.J. read the following judgment of the court (SCOTT, MACKINNON, LUXMOORE, GODDARD and DU PARCQ L.JJ., and BUCKNILL J.): When this motion came before the court last term, Mr. Willett, for the wife, properly drew our attention to a decision of the Court of Appeal in *Shufflebotham* v. *Shufflebotham* (1), in which the court, consisting of Lord Sterndale M.R. and Warrington and Younger L.JJ., had refused the wife's application for security

(1) [1923] W. N. 51. (2) The Times, Oct. 13, 1921.

for costs. In that case the wife had been petitioner and had obtained a decree for dissolution of the marriage, with costs, after a trial which had lasted four days. She had obtained below an order for security for costs of 150*l.*, and she asked this court (1.) for security for the balance of costs in the court below not covered by the 150*l.* security, and (2.), for security for costs of the appeal. In regard to the latter, Lord Sterndale, giving judgment, said that it raised a very difficult question, but that no ground had been stated for the application nor was it suggested that the husband would be unable to pay the costs. He added that counsel had been unable to produce any authority in support of the contention that a wife's costs should be secured in this court on the same principle as in the Divorce Division, and ended by pointing out that since the passing of the Matrimonial Causes Act, 1857, there had been no precedent for any such order. He, consequently, thought that the court ought not to make one. Having regard to that decision, we felt it desirable that the present application should be heard before the full Court of Appeal, and adjourned the hearing to the first day of this term.

Serjeant Sullivan, in opening the motion, informed us that there had in fact been an earlier case in which this court had made an order for security of the wife's costs in a husband's appeal—that of *Vidal* v. *Vidal* (1). The motion in *Vidal* v. *Vidal* (1) was heard on October 12, 1921, before a full Court of Appeal, including Lord Birkenhead L.C. In *Vidal* v. *Vidal* (1), as in the present case, the petitioner was the husband alleging adultery against the wife, and his appeal was against the decision on that issue in his wife's favour. On the motion for security for costs in *Vidal* v. *Vidal* (1), the respondent wife and the co-respondent were represented by counsel and the husband appellant appeared in person. The Court of Appeal ordered the husband to pay 50*l.* into court as security for the wife's costs, and a like sum in respect of the co-respondent. The report does not state the reasons given by the Court of Appeal when ordering security for the wife's costs, and the case, therefore, does not establish the proposition that security in this court will be ordered as a matter of course merely because the wife has no means of her own for financing her costs of the appeal, but the case is a clear authority for the proposition that this court has

(1) The Times, Oct. 13, 1921.

C. A. 1943

KING v. KING.

jurisdiction to make such an order and will do so in appropriate circumstances.

Serjeant Sullivan made two submissions before us. The first was that the principle underlying the practice of the Divorce Division to make orders for securing the wife's costs is that the common law regards the assistance of solicitor and counsel and the payment of court fees as necessaries for which the wife is entitled, as of right, to pledge the husband's credit. The second, which he called his "major proposition," was that the protection of the marriage status is an interest of the State, and that the State is, therefore, concerned in the efficient conduct of divorce litigation in the courts, which considerations are sufficient to justify the practice of security for the wife's costs apart from the common law agency of necessity.

We do not think it necessary to discuss the second proposition, as the first was plainly enunciated in 1878 by the Court of Appeal (consisting of Bramwell, Baggallay and Thesiger L.JJ.) in *Ottaway* v. *Hamilton* (1), an action in which a wife's solicitor sued the husband for her costs in obtaining her divorce. That decision is sufficient to establish the common law rule that the wife has authority to employ legal help at the expense of the husband in such a case as the present. It is true that the reason for the rule of practice giving the wife security for her costs was evolved in the old ecclesiastical court and continued by the court created by the Act of 1857 at a time when the wife had no property (other than settled property) of her own out of which to defray such expenditure, and that, as Hill J. said in *Williams* v. *Williams* (2), the Married Women's Property Acts have greatly modified the position of the wife. The practice, however, both before and after the Matrimonial Causes Acts of 1857 and 1873, has always been only to give the wife security in cases where she has not sufficient estate to pay her own costs. This practice was recently recognized as still right and proper by the Court of Appeal in *Johnstone* v. *Johnstone* (3), where Lord Hanworth M.R. said: "The old rules of the Ecclesiastical Courts were "preserved by s. 22 of the Matrimonial Causes Act, 1857 "(20 and 21 Vict. c. 85), and are now produced by s. 103 of "the Supreme Court of Judicature (Consolidation) Act, 1925. "The result is that the old rule as to the costs of the spouses

(1) [1878] 3 C. P. D. 393.
(2) [1929] P. 118.
(3) [1929] P. 165, 172.

"is still applicable to costs in the Divorce Division, and the "husband has to make provision for costs of the wife to enable "her to contest the issue."

We expressly limit our decision to cases like the present because, where the judge exercising divorce jurisdiction makes a decree of dissolution on the ground of the wife's adultery against the wife, the doctrine of a common law agency of necessity would seem to be excluded. On the other hand, if a decree which terminates the married status excludes the rule, a solicitor might hesitate to undertake the conduct of an impecunious wife's case if he had only the common law principle of agency on which to rely to get his costs and were driven to sue the husband, and it may be that, for the sake of public policy in relation to the protection of the married status, the rule of ordering security should be regarded as, for that very reason, equally enforceable in the case of a wife seeking to appeal from a decision against her. That question we keep open.

In this case we have directed the registrar of the court, who is also a registrar of the Probate and Divorce registry, to fix the amount of the security to be provided by the husband. We think that this procedure is more satisfactory than would be the case if this court itself attempted to fix the security. Rule 74 of the Matrimonial Causes Rules, 1937, prescribes the procedure to be adopted where the wife obtains security for her costs of the hearing, and it appears to us that in such a case as the present this procedure, so far as it is applicable to an appeal, should also apply. The amendment of this rule on February 16, 1943, is not material for present purposes. The motion is allowed, the amount of the security to be fixed by the registrar. The husband will pay the wife's costs of this motion.

Motion granted.

Solicitors for wife: *Ernest Bevir & Son, for Pinniger, Finch & Co., Westbury, Wilts.*

Solicitors for husband: *Shaen, Roscoe & Co., for Wansburghs, Robinson, Tayler & Taylor, Devizes.*

A. W. G.

1943
July 21, 22, 23, 26, 30.

THE QUERCUS.

Shipping—Damage—Moorings—Breaking adrift—Duties of harbour authorities—Inspection and maintenance—Onus of proof.

The plaintiff's yacht broke adrift from the defendants' moorings, which had been let by them to the plaintiff, and the yacht became a total loss. The accident was caused by the mooring chain parting through kinking, and the kinking was caused or contributed to by the failure of a swivel to work effectively owing to rust and marine growth. The moorings were inspected once a year by the defendants' diver who examined the slack parts of the chain and the swivel in the diver's boat, and the lower parts of the moorings, which were always under water, by diving and letting the chain pass through his hands :—

Held, (i.) that the defendants did not warrant the efficiency of the moorings, but that their obligation was to exercise reasonable care and skill to maintain their efficiency ; (ii.) that the circumstances raised a prima facie case of negligence against the defendants ; and (iii.) that the inspection was insufficient and that the defendants had failed to discharge the burden imposed upon them.

Principles stated in *Williams & Sons, Ld.* v. *Port of London Authority* (1933) 47 Ll. L. Rep. 81, applied.

ACTION of damage.

The plaintiff was the owner of the auxiliary yacht, *Quercus*. The defendants were the mayor, aldermen and burgesses of the borough of Torquay. The *Quercus* was a yacht of 6.9 tons gross register, and at the material time was moored in Torquay harbour at No. 43 mooring, which was the property of the defendants, and was hired by them in July, 1941, to the plaintiff. During the night of November 9–10, 1941, the moorings parted and the *Quercus* drove ashore and became a total loss. When the moorings parted there was a gale of wind, but the wind and sea in the harbour were not abnormal in force, and the *Quercus* was the only vessel which parted her moorings. The mooring chain which parted was three-eighths of an inch in diameter and had been put down as a galvanized new chain in May, 1940. The chain was fastened at its lower end to a spring chain of three-quarters of an inch diameter and about nine feet in length, and this chain was fastened to a trot mooring which was secured to the bottom of the harbour. The mooring chain had a swivel inserted in it to prevent the chain kinking when the yacht swung at her moorings. The plaintiff took the

1943

THE QUERCUS.

Quercus out under sail three or four times a week until the end of October, 1941, when his permit to use her expired, and thereafter she remained continuously at No. 43 mooring until the chain parted. He was last on board on November 8, when he tightened up the end of the mooring chain on the yacht's bollard. The swivel was always below the water level and the plaintiff never saw it. After the casualty the end of the broken chain which remained fast to the *Quercus*, and the other end which remained fast to the spring chain, were recovered and produced in court. The chain was rusted and slightly worn, but it was sufficiently strong in its then condition to be an efficient mooring chain for the *Quercus* although it had nothing to spare in strength and it required careful inspection and maintenance if it was to continue to be efficient. Three of the links were slightly distorted, and one had a slight fracture in the welding. It was admitted by both sides that these injuries were such as might have been caused after the *Quercus* broke adrift with this part of the chain still fast to her. When examined in court, the bolt of the swivel in certain positions rubbed, and to a limited extent caught against, the barrel of the swivel, but the Elder Brother considered the swivel to be reasonably efficient for its purpose if properly examined and maintained. The moorings were examined every twelve months. The diver went out to them in July, 1941. The slack part of the chain and the swivel (which, the diver said, worked all right) were then hauled into the diving boat and examined, and then the diver examined the part under water by letting the chain pass through his hands. The moorings were never unshackled. The plaintiff alleged that the defendants impliedly warranted that the moorings were in a fit condition and/or that it was their duty to keep the moorings in a fit condition, and that they failed.

Hayward K.C. and *Porges* for the plaintiff. This is a case of res ipsa loquitur. The moorings were under the management of the defendants, and where the accident was such as " in the "ordinary course of things does not happen if those who have "the management use proper care, it affords reasonable "evidence in the absence of explanation by the defendants "that the accident arose from want of care " : *Scott* v. *London and St. Katherine's Dock Co.* (1). Either the swivel was faulty, or it did not receive proper care and attention, and,

(1) (1865) 3 H. & C. 596.

1943

THE QUERCUS.

consequently, the chain kinked. [Reference was also made to *The Moorcock* (1) and *The Merchant Prince* (2).]

Sir Robert Aske K.C. and *Gething* for the defendants. This is not a case of res ipsa loquitur: see *Edwards* v. *Newton* (3). In all the cases to which the principles laid down in *The Moorcock* (4) have been held to apply the accident has followed closely on the berth or mooring being hired. Here, the moorings had been handed over to the plaintiff and were not under the control and management of the defendants. Their sole duty was to exercise reasonable care to see that the moorings were not defective: see *Williams & Sons, Ld.* v. *Port of London Authority* (5). The defendants need not disprove negligence. They merely have to show that there may be a reasonable explanation of the accident other than their negligence: *The Kite* (6). [*The Mulbera* (7) and *Kearry* v. *Pattinson* (8) were cited.]

Hayward K.C. replied.

Cur. adv. vult.

July 30. BUCKNILL J. read a judgment in which he stated the facts, and continued: I now proceed to consider the question of liability. First, I will deal with a point raised by the defence, namely, that the mooring parted through a latent defect in the link. The evidence seems to me to negative this suggestion. On the other hand, I find in the defendants' favour that the mooring chain and swivel when laid down in 1940 were sufficiently strong to hold the *Quercus*. The next question is whether the mooring chain parted from kinking. My conclusion is that it did. This kinking might be caused in many ways, and not necessarily by the failure of the swivel to act. This is also the advice of the Elder Brother. The next question to consider is whether such kinking may have been caused, or contributed to, by the defective state of the swivel. My conclusion on this issue is that the damage was caused by the kinking of the chain and that the kinking was caused or contributed to by the failure of the swivel to work effectively owing to rust and marine growth between the bolt and the barrel.

Are the defendants liable on these findings? In my view,

(1) (1889) 14 P. D. 64.
(2) [1892] P. 179.
(3) (1934) 48 Ll. L. Rep. 155.
(4) 14 P. D. 64.
(5) 47 Ll. L. Rep. 81.
(6) [1933] P. 154.
(7) [1937] P. 82.
(8) [1939] 1 K. B. 471.

1943

THE QUERCUS.

Bucknill J.

the fact that the chain broke at a time when it was exposed to stresses which it ought to have been able to resist establishes a prima facie case of negligence against the defendants, and they are liable unless they prove that they took reasonable care to provide and maintain an efficient mooring chain. The defendants, however, do not warrant the efficiency of the chain. They only undertake to exercise reasonable care and skill in the matter of its selection and of its maintenance. The judgment of Branson J. in *Williams & Sons, Ld.* v. *Port of London Authority* (1) supports me in this opinion as to the measure of the defendants' responsibility. The facts in that case were somewhat like the facts here, but they were different in that Branson J. was unable to come to any definite conclusion as to the cause of the fracture of the mooring shackle. He decided that the circumstances were such as to raise a prima facie case of negligence against the defendants, and that unless they could establish that they had taken all reasonable care to keep their moorings in order they were liable. It was not necessary, he said, for the plaintiffs to satisfy the court as to what was the real cause of the accident. The real cause of the accident was only material if and so far as it enabled him to see whether due care and skill had or had not been applied by the defendants in an endeavour to prevent such an accident happening. The question on this aspect of the case was: "Have the defendants failed in giving to "this piece of shackle that sufficient inspection which they "should have given it in order to see that no defect had "developed in it, and that it would still remain capable of "doing the work for which it was intended? The amount "of inspection which is reasonable must always be a question "of fact. You cannot lay down any general principle to "decide whether you have got to inspect a piece of apparatus "once a week or once a month or once a year or once in ten "years. But I think one can say this, that the amount of "inspection necessary must bear some relation to the possible "risk of deterioration to which experience and theory show "that the apparatus in question is exposed."

Applying this rule to the present case, the question is whether an annual inspection of the chain and swivel as made by the diver was reasonable, having regard to the possible risk of the jamming of the swivel and the kinking of the chain and its consequent fracture which an experienced man ought to

(1) 47 Ll. L. Rep. 81.

1943

THE QUERCUS.

Bucknill J.

anticipate and guard against. I have asked the Elder Brother whether, accepting the diver's evidence of his annual inspection as substantially accurate, such an inspection was (i.) sufficient in point of time, and (ii.) adequate in point of method. He advises me that, if the defendants inspect the moorings once a year only, they ought to make a proper inspection, and that an inspection under water by the diver of that part of the length of chain nearest the spring chain was inadequate, that it is impossible for the diver to see small fractures or distortion of links covered with mud under water and that it is most important to examine the part nearest the spring chain. He also advises me that the end of the chain should be unshackled and brought up on deck, washed and carefully examined link by link. He also advises me that to make a proper examination of the swivel it ought to be washed and carefully examined for rust and marine growth and any such obstructions adhering to the swivel should be carefully cleaned off.

I accept this advice which seems to me to be reasonable and agrees with my own view of the matter. I, therefore, hold that the defendants are liable. As I have already said, the case is one in which the mere breakage of the chain raises the inference of negligence on the part of the defendants. That being so, the burden is cast on them to prove that they have taken all reasonable care to keep their moorings in proper condition by suitable inspection and examination. In this case they have failed to discharge this burden and therefore they are liable. There will be judgment for the plaintiff, with costs.

Solicitors for plaintiff: *Stocken, May, Sykes & Dearman, for Bond, Pearce & Elliott, Plymouth.*

Solicitors for defendants: *W. C. Crocker, for Almy & Thomas, Torquay.*

E. C. M. T.

Distinguished. PEEK *v.* PEEK. [1948] 2 All E.R. 297.

Discussed. PRINCE *v.* PRINCE [1951] P. 71

PETTY *v.* PETTY.

1943
July 14.

Divorce—Practice—Re-hearing—Cause heard by judge alone—Application to Divisional Court—"Error"—Preparation of applicant's case prejudiced—Matrimonial Causes Rules, 1937 (*St. R. & O.*, 1937, *No.* 1113, *L*/14), *r.* 36 (1.), (2.).

By her petition the wife sought a dissolution of her marriage on the ground of her husband's cruelty and desertion. The husband defended, and by his answer made a cross-charge of desertion against his wife on which he asked for a decree of dissolution. At the hearing of the suit witnesses were called on both sides and both spouses were examined and cross-examined. The judge based his decision to dismiss the wife's charges of desertion and cruelty and to find in favour of the husband's cross-charge of desertion against the wife on his preference for the credibility of the husband as a witness. On an application to a Divisional Court, purporting to be made under r. 36 (1.) of the Matrimonial Causes Rules, 1937, for the re-hearing of the cause, it was stated that the preparation of the wife's case had been interfered with by enemy action, and that, since the hearing, she had obtained statements from several witnesses, the result of whose evidence would be to induce the tribunal which re-heard the cause to say that the party to whom credence should rightly be attached was the wife and not the husband :—

Held, that the application was not one in which "no error of "the court at the hearing" was alleged; that it did not fall within r. 36 (1.) of the Matrimonial Causes Rules, 1937; and, therefore, that it could not be dealt with by the Divisional Court, but must be made to the Court of Appeal under r. 36 (2.).

Manners v. *Manners* [1936] P. 117, and *Winter* v. *Winter* [1942] P. 151, distinguished.

APPLICATION for re-hearing of cause heard by Hodson J. alone (1).

The facts are stated in the headnote.

Hollins (*W. Latey* with him) for the wife. The Divisional

(1) By r. 36 of the Matrimonial Causes Rules, 1937: "(1.) An "application for re-hearing of a "cause heard by a judge alone "where no error of the court at "the hearing is alleged shall be "made to a Divisional Court "of the Probate Division. The "application shall be by notice "of motion, stating the grounds "on which it is based, filed in the "Divorce Registry and served "upon the opposite parties within "six weeks after judgment. The "notice shall be a fourteen days "notice and may be amended at "any time by leave of the judge. "(2.) Any other application for "re-hearing shall be made by way "of appeal to the Court of "Appeal."

1943

PETTY v. PETTY.

Court has jurisdiction to deal with this application because "no error of the court at the hearing is alleged": r. 36 (1.) of the Matrimonial Causes Rules, 1937. If the additional evidence in support of the wife's case which is now available had been before the court at the hearing, the judge might have given a different finding, but on the facts before him the judge was right and, therefore, there was "no error." "Error" means that the judge misdirected himself or admitted or rejected evidence which he should not have done, and that is not alleged here. Where there is nothing on which it can be said that the judge was wrong, there is no error. [*Manners* v. *Manners and Fortescue* (1); *Winter* v. *Winter* (2); and *Taylor* v. *Taylor and Darg* (3) were referred to.]

Walter Lloyd for the husband.

LORD MERRIMAN P. The question for our decision is whether this application for re-hearing complies with the condition contained in r. 36 (1.) of the Matrimonial Causes Rules, 1937, that "no error of the court at the hearing is "alleged." Before alluding to any authorities I would emphasize that this court bears fully in mind the necessity of avoiding any semblance of trespassing on the exclusive jurisdiction of the Court of Appeal. We feel that the peculiar jurisdiction vested in this court by r. 36 (1.) should only be exercised in cases in which it is plain that this court is intended to have the jurisdiction to the exclusion of the Court of Appeal.

What is meant by the words "no error is alleged"? Not for the first time, when considering this question, we have tried to ascertain whether any historical meaning is to be attached to them. For instance, should the question "error" or "no error" for the purpose of r. 36 (1.) be decided on the principles applicable to proceedings in error as that procedure was understood before it was abolished? I cannot think that that can be so. It would, in my view, be a strained and artificial construction to attach to the word "error"—which was first used in this connexion in the Matrimonial Causes Rules, 1924—the technical meaning attached to procedure which was abolished fifty years before. On the other hand, we have again gone exhaustively through the statutes and the earlier rules governing every form of appeal or application for a re-hearing since the Matrimonial Causes Act, 1857, and, so

(1) [1936] P. 117.
(2) [1942] P. 151.
(3) (1899) 81 L. T. 494.

far as is necessary to understand that Act, before that time. For example, s. 23 of the Matrimonial Causes Act, 1857, gives a special jurisdiction to set aside a decree of judicial separation when a party is able to show, first, that the decree was given in his or her absence, and, secondly, that there is reasonable ground on the merits for setting it aside. Further, there was power originally vested in the full court but subsequently by statute transferred to the judge ordinary, to order a new trial where questions of fact had been decided by a jury. I need not go into the limitations on that, but it was a jurisdiction which was clearly established, and was held by the Court of Appeal, when the Court of Appeal was set up, to have survived the establishment of that court. That is made manifest by *Westhead* v. *Westhead* (1), and was reaffirmed in *Robinson* v. *Robinson* (2). The latter case was argued by counsel of such calibre as to make it plain that it was a test case intended to induce the Court of Appeal to reconsider the earlier decision. By the Judicature Act, 1881, s. 9, the power to grant an application for a new trial was transferred from the full court of this division to the Court of Appeal, and the only exception to their universal jurisdiction to deal with applications for new trials is the special case provided for by r. 36 (1.). In my view, it is impossible to attach to the word "error" in that rule any interpretation or limitation based solely on any part of the earlier history of this court. It is much more likely that the words were deliberately chosen as being apt to impose a limitation on our special jurisdiction to order a re-hearing notwithstanding the vesting in the Court of Appeal of the general right to deal with such applications from this division. In other words, I think that this phrase has to be translated upon its own merits.

Where, then, is the line to be drawn? I think that it was Lord Blackburn who said that, although it might be difficult to say where a line should be drawn, it might be easy to say that a particular case was on one side or the other of any line that could be drawn. I have no doubt that the decision to which I myself was a party, *Manners* v. *Manners* (3), was on the right side of any such line, because it depended on our finding that there had been complete, if unintentional, failure in service of process, and that justification for the decision is

(1) (1876) 2 P. D. 1.
(2) (1877) 2 P. D. 77.
(3) [1936] P. 117.

1943

PETTY v. PETTY

The President.

in no way affected by the subsequent history of the case. Equally, I have no doubt that a Divisional Court consisting of the late Langton J. and my brother were right in their decision in *Winter* v. *Winter* (1) although that case was more difficult because, had the application been in a common law case, it is extremely doubtful whether any Court of Appeal would have listened to it, since the spouse making the application had deliberately abstained from taking any part in the proceedings. The court, however, bore in mind the fact, so often stressed both in this division and in the Court of Appeal, and nowhere more clearly than in the decision of the full Court of Appeal in *Harriman* v. *Harriman* (2), that in matrimonial disputes there is another interested but uncited party, namely the State, which has an overriding interest that the court shall be satisfied, not merely in the interests of the parties as parties, but also in the interests of public morality and the preservation of the sanctity of marriage, that a decree has been rightly obtained. Those two cases, which, so far as I know, are the only two cases in which a decision of this court on this point has been reported, are, as I think, clearly on the right side of the line. Equally, however, it seems to me impossible to assert that a case in which a judge, having seen both spouses and their respective teams of witnesses, has deliberately attached credibility to one side and not to the other, and in which this court is asked to say that the production of further evidence will induce some other tribunal to say that the judge believed the wrong set of witnesses, is on the same side of the line, so that it can be asserted of such a case that "no error of the court at the hearing is alleged."

In saying this I do not ignore the point that logically in a case in which process has not been served or where one party has deliberately abstained from attendance, it is not possible to deny that it is being said that the judge has believed a witness wrongly. In the former case, of course, an affidavit has been sworn that the process was served. There may have been mistaken identity, or there may have been perjury. In the latter case, the petitioning spouse has sworn to the truth of his or her story and witnesses have sworn to the facts they have stated. Again it may be mistaken identity, or it may be deliberate perjury, but, although it is true that what is being asked is that it shall be held that the judge believed a witness wrongly, and although at the re-hearing,

(1) [1942] P. 151. (2) [1909] P. 123.

the court is to be invited to believe witnesses who will swear exactly the opposite, still, in those circumstances, unless there was something which made the story self-condemnatory, the judge had no option but to believe the witness. There was no contest. There was no possibility of testing the credibility of the witnesses believed, unless by what I might call some psychic test which would manifest itself through mere demeanour during the brief appearance of the witness in the witness box. Such a case as the present is, in my opinion, on the other side of any line which can be drawn, and is plainly a case which must be dealt with by the Court of Appeal. In my opinion, this application is misconceived and must be rejected.

HENN COLLINS J. I agree. I do not believe that it would be desirable, even it it were possible, so to define the words "error of the court" as at once to embrace all cases which fall within them and exclude those which do not. One thing, however, seems to me to be clear, and that is that, if it is alleged that, on the materials before it, the court has arrived at a wrong conclusion, that is an error of the court. What exactly is meant by "the materials before the court" is another matter. In the present case the material before the court was the evidence of witnesses on one side and the other. The judge accepted the credibility of one set of witnesses and rejected that of the other. It is now said that he believed the wrong set of witnesses, and that, if he had known some further facts which it is proposed to adduce, he would have discredited those whom he believed and believed those whom he discredited. That must mean that he was unable to arrive at what is now alleged to be the truth on the materials before him, in other words, that he made an error. In those circumstances how can it be said that "no error of the court is alleged." I have said that I do not propose to try to define those words, but I am not sure that they are not, so to speak, the mummified remains of s. 23 of the Matrimonial Causes Act, 1857, which created an exceptional jurisdiction vested in the judge ordinary to set aside decrees in the cases in which he had jurisdiction to act alone, namely, where the respondent had not appeared. Without saying that the present rule is confined to such cases, it is to be observed that in the only two reported cases in which the scope of r. 36 (1.) has come in question, s. 23 of

1943

PETTY v. PETTY.

the Act of 1857, had it still been operative, would have applied. With that addition I entirely agree with what has fallen from my Lord, and this application must be dismissed.

Application dismissed.

Solicitors for wife: *Gibson & Weldon, for Hobson Thomas, Sherwell & Wells, Portsmouth.*

Solicitors for husband: *Amphlett & Co., for Stokes & Metcalfe, Portsmouth.*

T. A. H.

1943

July 21.

Referred to. POWELL v. POWELL [1951] P. 257

COLLINS *v.* COLLINS.

Divorce—Maintenance—Computation—Serving Air Force officer's income—Allowances in addition to pay.

The allowances, not subject to income tax, which are made to a serving Air Force officer in addition to his pay, are intended to be in mitigation of hardship for extra expenses incurred under service conditions. Therefore, in computing such an officer's income for the assessment of maintenance, these allowances must not be calculated as income. They may, however, be taken into account as part of the circumstances of the case.

SUMMONS adjourned into court.

The husband was a serving officer in the Air Force, who, since he had been divorced by the petitioning wife, whose maintenance was in question, had married again. As a squadron leader his pay was 528*l.* a year. In addition, he had, at the material time, allowances of 22*l.* a month. To arrive at the husband's income, the registrar's contention was, that as these allowances were not subject to income tax they must be, to use the common expression, "grossed up," so as to represent an income of 44*l.* a month, subject to the deduction before grossing up of 6*l.* a month which represented actual extra cash expenditure to which the husband would be put. By this process 16*l.* a month became 32*l.* a month or 384*l.* a year, which, added to the husband's pay of 528*l.* a year brought his income up to 912*l.* a year. The husband appealed from the registrar to Lord Merriman, P., in chambers, who adjourned the matter into court.

Arthian Davies for the husband.
Hollins for the wife.

1943

COLLINS v. COLLINS.

LORD MERRIMAN, P. [after stating the facts:] In my view, the method adopted by the registrar in dealing with this matter is not correct. It seems to me to be impossible to treat these allowances as net income which must be doubled and imputed as income to the husband at a notional gross value. It is clear from the official letters which have been put in evidence that these allowances are intended to be in mitigation of hardship to the husband for the extra expenses which he incurs under service conditions. In certain circumstances he may draw lodging, fuel and light allowance. In other circumstances he may draw what is called the consolidated allowance in respect of separation from his family, and the allowances may vary almost from day to day and from week to week. They have, in fact, varied very considerably since the date when this matter was before the registrar. In my opinion, and Mr. Hollins has not attempted to argue the contrary, it is impossible to hold that that, or any part of it, is net income which, in the present state of income tax, must be doubled, and imputed to the husband in the gross calculation at twice its face value as actual income.

To take these allowances into account as income of the husband would be to fly straight in the face of the only reported decision of the Court of Appeal to which my attention has been called, that in *Naish* v. *Naish* (1). If that case were taken literally, these allowances would have to be ignored altogether, but I do not think that it must be taken as a decision of universal application. The soldier in question had come from British Columbia, and, therefore, so to speak, was living under two systems of law. His family were on the other side of the Atlantic, and the situation was obviously very special. I do not think I am obliged by that case to say that the fact that the husband has these allowances must be ignored altogether, and, indeed, it is agreed at the bar that, provided the allowances are not treated as part of the husband's income and "grossed up" accordingly, they should be taken into account as part of the circumstances of the case; I think that their real significance is this: In meal or in malt they enable the husband to live under service conditions, and they free his pay so that, without any

(1) (1916) 32 T. L. R. 487.

1943

COLLINS v. COLLINS.

The President.

substantial call on it for his own expenses of living, he can devote his pay to the maintenance of his first wife and the maintenance of his new wife. That is a matter to be taken into account.

It has been said in the course of the argument that that is a vague phrase which will mean nothing when the matter goes back to the registrar. That ought not to be so if what I have said is given any weight. I ventured, in *Chichester* v. *Chichester* (1) to say that there were certain sums which, although they could not be dealt with as a matter of strict calculation on one side or the other of the account, had to be taken into account to arrive at a just solution, for a just solution, as I have often said, cannot be arrived at merely by taking a rule-of-thumb calculation as between the respective incomes of the husband and the wife, adding them together, dividing by three, and so on. Perhaps it is a little significant that in one well-known textbook that case is described as the locus classicus, whereas in the recent edition of another well-known textbook it is completely ignored. The matter which I said must be taken into account in that case, although it could not be quantified by rule-of-thumb, was that the husband was under an obligation by covenant to the children of his marriage with a former wife by whom he had been divorced. I said (2): "I am not going to say that the "burden of that covenant must as a matter of law be deducted "in arriving at any present calculation of maintenance. "What I say is that it is quite plainly a circumstance which "is to be taken into account, in the words of the statute, "in considering the husband's ability." Mutatis mutandis, precisely the same considerations apply here. The husband's ability to pay out of his pay of 528*l.* by the year is increased by the fact that, in addition, he draws whatever he is, at the moment, drawing by way of service allowances. In that sense, and in no other sense, must this item be taken into account, but it is, as I think, an important matter to be taken into account in deciding what proportion, if any, of the joint incomes the wife should be allotted out of the husband's income properly so-called.

I hope that with these directions it will be possible to arrive at a satisfactory figure. It will probably not be necessary to go into any further elaborate calculation of what the allowance is at a given moment, because, if the matter is approached in the

(1) [1936] P. 129. (2) Ibid. 135.

1943

COLLINS v. COLLINS.

way I have indicated—that, roughly speaking, the allowances which the husband draws are conditional on the extra expense of his service for the time being—their precise amount at any given moment is not of importance. What is of importance is that he is drawing some such allowance or allowances. The matter will be sent back to the registrar for the settlement of the amount.

Solicitors for husband: *Kenneth Brown, Baker, Baker.*
Solicitors for wife: *Judge, Hackman & Judge.*

T. A. H.

THE GLENROY.

1943

July 19, 20, 23, 26; *Aug.* 26.

Shipping—Prize—Enemy—Appearance—Authority to prosecute claim—Enemy company—Claim by controller appointed to wind-up London branch—Licence—Form of affidavit—Duty of Procurator-General in case of doubt—Prize Court Rules, 1939, *Or.* II., *r.* 22; *Or.* III., *r.* 5; *Or.* XX.

An enemy alien must obtain the licence of the Crown to entitle him to be heard in the Prize Court unless his claim is based on some ground (such as an international treaty or convention, a cartel, or a pass) which enables him to sustain a persona standi in judicio, and this is so even if he does not assert any positive right to the release of the subject-matter of his claim but merely resists its condemnation. The Prize Court itself has no discretion to hear an alien enemy whose claim is not based on an immunity recognized under the law of nations administered by the Prize Court.

Dictum as to discretion in *The Pomona* [1943] P. 24, not followed.

Dicta in *Sovfracht (v/o)* v. *Van Udens Scheepvaarten Agentuur Maatschappij (N.V. Gebr)* [1943] A. C. 203 discussed and explained.

The affidavits required to be filed on behalf of an alien enemy under Or. II., r. 22, and Or. III., r. 5, of the Prize Court Rules, 1939, should state the capacity in which the deponent purports to speak and disclose the basis of the claimant's assertion of a persona standi in judicio. A claimant who, after entering an appearance, becomes an enemy should file an affidavit on the same lines.

The duty of the court, when a doubt arises, to assure itself that an enemy claimant can sustain a persona standi in judicio, and, if so, is regularly represented before the court, cannot be abrogated, but it is inconvenient that such matters should be left to the initiative of the court or stand over until the hearing, and, therefore, the Procurator-General should bring the matter to the test by interlocutory application under Or. XX.

1943

THE GLENROY.

After the outbreak of war with Germany a quantity of beans consigned before the war by a Japanese company to their Hamburg branch in a British ship were seized as prize. After Japan came into the war a controller was appointed under the Trading with the Enemy Regulations to wind-up the London branch of the Japanese company. He entered an appearance, and filed a claim, on behalf of himself as controller, and also on behalf of the London branch and the company in Japan, that he, the branch, or company was the sole owner of the beans which were shipped before the war and were not liable to seizure and condemnation as contraband or on any other ground :—

Held, that, so far as the claim related to the London branch, the controller required no further licence to prosecute his claim than his appointment as controller, but that, as regards the claim on behalf of the company in Japan he had no locus standi and must obtain some authority from the Crown entitling him to be heard.

SUMMONS in an action in prize.

At the outbreak of the war with Germany in September, 1939, the *Glenroy* was in course of a voyage from eastern ports to Hamburg via London. Included in her cargo were 2240 bags of beans consigned by the Otaru branch of a company incorporated in Japan (hereinafter called the Mitsui Co.) to a branch office of the Mitsui Co. carrying on business at Hamburg, under a contract dated July 11, 1939. After the outbreak of war the *Glenroy* was diverted to Liverpool where she arrived on October 17, 1939. On November 2, 1939, the beans were seized in prize. On November 16, 1939, a writ in prize was issued. On December 18, 1939, an appearance was entered for Mitsui & Co., Ld., as owners of the beans. Mitsui & Co., Ld. (hereinafter called the London branch), was the branch office in the United Kingdom of the Mitsui Co. and was registered as such under the Companies Act, 1929, but before the entry of Japan into the war, it had no legal entity, either under the Companies Act or at common law. On July 23, 1940, it obtained an order for the release of the goods on bail. On December 29, 1941, however, after Japan had become a belligerent, one Spencer, a chartered accountant, was appointed, under s. 3, sub-s. 2, and s. 7, sub-s. 1 (*d*) (iii.), of the Trading with the Enemy Act, 1939; the Defence (Trading with the Enemy) Regulations, 1940; and s. 3A, sub-s. 1 (*a*), added to the Act and to the regulations by Order in Council (St. R. & O., 1940, No. 1289), controller of the London branch to supervise the carrying out of a " restriction order " within the meaning of the section last mentioned and under a winding-up order to supervise the winding-up of the London branch. On

1943

THE GLENROY.

March 2, 1943, an appearance was entered on his behalf as controller of the London branch, and on March 12, 1943, he filed a claim in his capacity as controller of the London branch on behalf of himself as controller and also on behalf of the branch and of the Mitsui Co., "the true lawful and sole owners "of the beans," for the losses, costs, charges, damages, and expenses arising from the seizure. The grounds of the claim were that the controller, branch, or company was the sole owner of the beans which were shipped from Japan before the declaration of war and that they were not at any time liable to be treated as contraband or liable to condemnation on any other ground. This summons, taken out by the Procurator-General, raised the preliminary points: (*a*) Whether in any and what circumstances a claimant, who, according to municipal law, was an enemy, required specific authority from the Crown to enable him to prosecute his claim in a court of prize in this country; (*b*) whether, on the facts of the case, the claimant required any further or other authority to prosecute his claim than he had already obtained; and, in either case, (*c*) what practice should be prescribed to regulate the procedure.

Sir Donald Somervell A.-G. and *J. V. Nesbitt* for the Procurator-General. The effect of all the older authorities is that prima facie an enemy alien has no locus standi in the Prize Court unless he can show that he is authorized to come within the King's peace by reason of a cartel, pass, treaty, or convention, which pro hac vice entitles him to be heard. In the last war in many cases an enemy relying on some international agreement was allowed to appear; and in the present war, no objection being taken, and the point now raised not being argued, the court in its discretion allowed an enemy to be heard whose claim was based on the alleged existence of an international law analogous to articles of the Hague Convention which had been denounced. *The Pomona* (1). If, however, the principles stated in *Sovfracht* (*v/o*) v. *Van Udens Scheepvaarten Agentuur Maatschappij* (*N.V. Gebr*) (2), as to the necessity for the King's licence in the ordinary courts are applicable to the case of an enemy appearing in the Prize Court, it would seem that the court cannot waive the necessity for such a licence. It is, however, difficult to give the go-by to the many cases decided in the last war, and there is no case in prize in which a "royal licence" has been applied for. Such a licence would

(1) Ante p. 24. (2) [1943] A. C. 203.

1943

THE GLENROY.

be given by the Home Office and not the Board of Trade. A possible view is that Or. III., r. 5, of the Prize Court Rules, 1939, which provides that "an alien enemy shall, before "entering appearances, file in the registry an affidavit stating "the grounds of his claim," gives him a general right to appear and that no licence is required, or it may be thought that his affidavit must show a cause which brings him within the existing immunities, or, that if it is a border-line case, it is a proper one for a licence. It is admitted that if and so far as the goods claimed were assets of the London branch the claimant has no need of any further licence. The Procurator-General would not object to the view that the court has a discretion or to a broad view being taken, as in the Prize Courts of nearly all other countries, which allow an unlimited right of audience to enemy claimants. He merely wishes for directions as to the procedure to be followed. [In addition to the cases fully discussed in the judgment reference was made to *The Fenix* (1), *The Ophelia* (2) *The Eden Hall* (3) and *The Prins Knud* (4).]

Sir Robert Aske K.C. and *Gething* for the claimant. A controller does not require any other licence than his appointment by the Board of Trade to enable him to appear and claim in the Prize Court. Mr. Spencer (being out of time under the Prize Court Rules) was, however, given leave by the court, on February 26, 1943, to put in an appearance and file a claim. [*Nesbitt.* The Procurator-General at that time was not aware that the controller would put forward a claim on behalf of the company in Japan.] On the wider issue it is conceded that an alien enemy cannot sue as a plaintiff unless he is within the King's peace. The Prize Court Rules themselves, however, command an enemy whose goods have been seized to enter an appearance, and there is a distinction between claiming the release of property and merely resisting its condemnation. In the latter case the so-called "claimant" is really in the position of a defendant. An enemy can be sued, and, therefore, can appear in his defence: *Porter* v. *Freudenberg* (5); see also *The Achilles* (6), *The Emil* (7) and *The Flamenco* (8).

(1) (1854) Spinks 1.
(2) [1915] P. 129; [1916] 2 A. C. 206; 1 Br. & Col. P. C. 210; 2 Br. & Col. P. C. 150.
(3) [1916] P. 78; 2 Br. & Col. P. C. 84.
(4) [1941] P. 39.
(5) [1915] 1 K. B. 857.
(6) [1919] P. 340; 3 Br. & Col. P. C. 632.
(7) (1915) 1 Br. & Col. P. C. 257.
(8) (1915) 1 Br. & Col. P. C. 509.

Nesbitt, in reply, referred to *The Gerasimo* (1) and *The Katwyk* (2).

1943

THE GLENROY.

Cur. adv. vult.

Aug. 26. LORD MERRIMAN P. read a judgment in which he stated the facts, and continued: Under the Trading with the Enemy legislation in force during the last war it was settled that, for the purposes of winding-up, such an undertaking as the London branch became a legal entity apart from the parent enemy company, though the winding-up order applied only to the assets and liabilities of the branch business: *In re W. Hagelberg Aktien-Gesellschaft* (3), and *In re Th. Goldschmidt, Ld.* (4). In the present war Bennett J. has held that these decisions apply to the Trading with the Enemy legislation now in force, and that a winding-up order made thereunder must be held to create, for the purpose of winding-up, a new entity, namely, the business ordered to be wound-up, and this entity is considered as one which can possess assets and have liabilities of its own: *In re Banca Commerciale Italiana* (5). Mr. Nesbitt admitted that if and so far as the goods were, at the material time, assets of the London branch the claimant had, without the necessity of obtaining any further licence or authority from the Crown, the right to be heard on his claim on behalf of the London branch, and that notwithstanding that as between themselves and the Mitsui Co. the London branch might ultimately be liable to account to that company: see *Continho Caro & Co.* v. *Vermont & Co.* (6). He contended, however, that if the ownership in the goods was in the Mitsui Co. to the exclusion of the London branch the claimant would have no authority whatever to be heard on behalf of the Mitsui Co., and, apart from the point that the claimant has in no way been appointed to represent the Mitsui Co. as distinct from the London branch, he based this contention on two grounds, first, that, on the facts deposed to in the claimant's affidavit in support of his claim, it is clear, in accordance with the principles laid down in the authorities which I am about to discuss that the Mitsui Co. can sustain no persona standi in judicio, and, secondly, that they must, therefore, obtain some licence or authority from the Crown to entitle them to be heard. Mr. Gething suggested

(1) (1857) 11 Moo. P. C. 88.
(2) (1915) 1 Br. & Col. P. C. 282.
(3) [1916] 2 Ch. 503.
(4) [1917] 2 Ch. 194.
(5) [1943] W. N. 86.
(6) [1917] 2 K. B. 587.

1943

THE GLENROY.

The President.

that it was necessary to plead the alleged interest of the Mitsui Co. in order accurately to define the nature of the claim, but this, so he argued, was a mere matter of form. He was, however, obliged to admit that, on the face of the claim, the claimant would be enabled to make any part of the claim on behalf of the Mitsui Co.

It is indisputable that a Prize Court in this country is bound by any enactment of the legislature governing its procedure. If, for example, Parliament chose to enact that in no circumstances should any enemy, or any particular class of enemies, be allowed to make or prosecute a claim in prize, or should only be allowed to do so subject to certain restrictions, and the enactment destroyed, or curtailed, rights recognized as settled by the law of prize heretofore administered in this country, this court would, nevertheless, be bound by the enactment. It is equally clear, however, that, in so far as those rights were destroyed or curtailed, the court would not, pro tanto, be administering the law of nations as that law has been interpreted by the Prize Courts of this country: see *The Zamora* (1). No such enactment is here in question, but it is obvious that these preliminary questions have arisen for decision because of certain observations in the House of Lords in *Sovfracht (v/o)* v. *Van Udens Scheepvaarten Agentuur Maatschappij (N.V. Gebr)* (2). That case, however, dealt solely with the municipal law. Any references, however weighty, to prize law must be taken as having been made for the sole purpose of elucidating the actual subject-matter of the decision, and, therefore, in relation to a Prize Court are obiter dicta. While this court must be scrupulously careful to observe any municipal law, by which it is bound, concerning the right of audience of an enemy, it is important that the court should not impose any unwarranted restriction on such right, more particularly as this country already restricts such right within narrower bounds than are set by many other Powers.

It is necessary, therefore, to ascertain what are the principles by which a Prize Court in this country is governed in this respect. I will begin by referring to the Prize Court Rules, 1939, made by His Majesty in Council under the authority of the Prize Courts Act, 1894. By Or. II., r. 22, where a writ is issued on the application of an alien enemy an affidavit shortly stating the grounds of the claim must be filed in the

(1) [1916] 2 A. C. 77. (2) [1943] A. C. 203.

1943

THE GLENROY.

The President.

registry before the writ is issued, and by r. 5 of Or. III. (which deals with appearances and claims), it is provided that an alien enemy shall, before entering an appearance, file in the registry an affidavit stating the grounds of his claim. It was suggested in the course of the argument that, as these rules have the authority of His Majesty, no other authority is needed to entitle an enemy to prosecute a claim. I do not think that this can be so. It seems clear that the requirement that an alien enemy before entering an appearance must state on oath the grounds of his claim is intended to enable the court to decide whether the grounds are such as to entitle him to be heard on his claim. A reference to the argument in *The Chile* (1) shows plainly that Sir Samuel Evans P. was of this opinion. Moreover, the President held in that case that the affidavit was wholly insufficient to entitle the owners to appear and struck out the appearance entered in their behalf, while expressly leaving undecided the general question whether they had any right to appear.

That brings me to an examination of the authorities. In *The Hoop* (2), Lord Stowell said: "In the law of almost "every country, the character of alien enemy carries with it "a disability to sue, or to sustain, in the language of the "civilians, a persona standi in judicio. The peculiar law of "our own country applies this principle with great rigour. "The same principle is received in our courts of the law of "nations; they are so far British courts, that no man can sue "therein who is a subject of the enemy, unless under particular "circumstances that pro hac vice discharge him from the "character of an enemy; such as his coming under a flag of "truce, a cartel, a pass, or some other act of public authority "that puts him in the king's peace pro hac vice: but otherwise "he is totally ex lex." In Pratt's edition of Story a licence and a treaty are added to the list of things suspending a claimant's hostile character. In *The Panaja Drapaniotisa* (3), Dr. Lushington examined the usual form of claim and affidavit then in use, and said: "The principle is this: that to support "a claim in the Prize Court the individual asserting his claim "must first show that he is entitled to a locus standi. No "person to whom the character of enemy attaches can have "such claim, save by the express authority of the Crown; "therefore, to prevent deception which might arise from the

(1) (1914) 1 Ll. P. C. 1, 31, et seq.
(2) (1799) 1 C. Rob. 196, 200.
(3) (1856) Spinks 337.

1943

THE GLENROY.

The President.

"use of ambiguous terms, and to stop claims which might be "preferred in one sense by the subjects of friendly or neutral "states resident in the enemy's country and carrying on a "trade there, it has always been deemed necessary that the "claimant should describe, both affirmatively and negatively, "the character in which he claims. He must describe the "place to which he belongs, and he must negative all enemy's "interest in a form specially framed for that purpose, and "intended to apply, to all intents, to any person resident "within the territories of the enemy, to whatever country "he may happen to owe allegiance. The excepted cases are "where an enemy merchant claims under an Order in Council, "or licence, and then, of necessity, the form is altered and the "ground of the special claim inserted. The form of the "affidavit has been altered from time to time, according to "the States with which Great Britain was at war. Originally "it excluded only persons resident in France; as the war "became extended, it was altered to affect the subjects of "other countries declared to be at war with Great Britain." I do not think that, in referring only to an Order in Council or a licence, Dr. Lushington can have intended to exhaust the sources from which the suspension of an enemy's hostile character might be derived. It may be assumed that he was thinking particularly of the Order in Council, in force during the Crimean war, giving six weeks' grace to enemy ships. The point is that, unless the enemy could show that he could sustain a persona standi in judicio by virtue of something which suspended his enemy character pro hac vice, it was settled law both during the Napoleonic and the Crimean wars that he had no right to be heard, and it was equally well settled that in his absence the sentence of condemnation would be completely valid as well against him as against the whole world: *The Falcon* (1); Pratt's Story, 111.

These principles were recognized and adopted by Sir Samuel Evans in *The Marie Glaeser* (2). Early in the last war, however, a difficult question arose in connexion with Hague Convention No. VI. By art. 1 of this convention it was laid down that when a merchant ship belonging to one of the belligerent Powers was at the commencement of hostilities in an enemy port it was desirable that it should be allowed to depart freely either immediately, or after a reasonable number

(1) (1805) 6 C. Rob. 194, 199. (2) [1914] P. 218; 1 Br. & Col P. C. 38.

1943

THE GLENROY.

The President.

of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it. And by art. 2 a merchant ship which, owing to circumstances beyond its control, might have been unable to leave the enemy port within the period contemplated in the preceding article or was not allowed to leave, might not be confiscated. The belligerent might merely detain it on condition of restoring it after the war without payment of compensation, or he might requisition it on condition of paying compensation. This convention substituted for the weeks of grace allowed during the Crimean war a pious expression of the desirability of allowing days of grace, coupled with a prohibition against condemnation and a provision for the ultimate release of the ship or compensation as the case might be. But when an order in this sense was made in *The Chile* (1) neither the question of the binding character of Convention VI. nor the question of the locus standi of an enemy relying on art. 2 thereof was expressly decided. The latter point arose for decision, and the former was assumed, in *The Möwe* (2). Sir Samuel Evans P. stated that the first question which arose for decision was whether the owner, admittedly an enemy subject and the owner of an enemy ship, had a right to appear as a claimant in the proceedings, or whether he should be given such a right in order to assert whatever privileges he deemed to be conferred on him by the Sixth Hague Convention. After again reviewing the authorities, to the more important of which I have already referred, Sir Samuel Evans paraphrased the claimant's position under the Hague Convention No. VI. in these terms: "I admit that I am an alien enemy; "and therefore that my ship was lawfully captured and seized "as being enemy property; but I wish to appear to put "forward and argue my claim that, in the circumstances of "my case the ship is not confiscable and cannot be condemned; "but can only be detained during the war to be restored to "me after the war." He adopted this paraphrase to make it clear that he understood himself to be engaged in extending the existing law. It seems to me to be very much to the purpose to consider why his decision to hear claimants who relied on Convention No. VI. was regarded as an extension, and how he justified making the extension. It was an extension because the enemy admittedly remained an enemy and was not

(1) [1914] P. 212; 1 Br. & Col. P. C. 1.

(2) [1915] P. 1; 1 Br. & Col. P. C. 60.

1943

THE GLENROY.

The President.

able to assert that his hostile character was suspended pro hac vice. This plainly appears on the face of his judgment, but if there were any doubt about it his observations in the course of the argument in *The Chile* (1) would make the point clear. The justification for the extension raises a more difficult question. Sir Samuel Evans appears to be laying down in the widest possible terms that the matter was not one of international law, but of the practice of the court. On the strength of this passage I was invited to hold that in this matter the court is restricted only by its own discretion, and that it is open to me to give an unrestricted right of audience to any enemy claimant. I am bound to say that, if this were the true interpretation of Sir Samuel Evan's judgment, I should find some difficulty in following it, more particularly as so wide a claim derives no support from decisions of the Privy Council which expressly or impliedly approve of the actual decision in *The Möwe* (2). But I do not think that this is the true effect of his judgment. Every judgment must be read in the light of the subject-matter. The subject-matter in this case was that the enemy claimant was indeed relying on an international treaty which prohibited condemnation and provided for the ultimate restoration of his property, though it did not suspend his enemy character. But, after all, the suspension of enemy character is a purely notional conception. It may have greater or less substance according to the circumstances of the case. Manifestly it would have greater substance in the case of an alien enemy to whom, for the benefit of this country, a licence to trade had been accorded, as not infrequently happened during the Napoleonic wars, while it might have much less substance in the case of a ship allowed to depart within the days of grace with the possible result that her subsequent activities would be inimical to this country. It was, no doubt, for this reason among others that the immunity from condemnation conferred by art. 2 of Convention No. VI. was substituted for the right to days of grace. The real contrast, therefore, appears to be between complete immunity from capture coupled with the fiction that the hostile character is suspended and mere immunity from condemnation coupled with the reality that the hostile character remains. This is suggested by the following passage of the judgment (2): "Having premised so much, I will now "consider whether the owners of an enemy vessel have a right,

(1) 1 Ll. P. C. 1, 37–41. (2) [1915] P. 1, 13.

"or should be given the right, to appear to put forward a "claim under the Hague Conventions, assuming, as was done "during the argument, that they are operative. Under some "of the conventions some degree of protection and relief is "given in respect of vessels which are not wholly immune "from capture at sea or seizure in ports; for example, under "the sixth convention the consequences of seizure or capture "are minimised and limited in certain cases, although complete "immunity is not afforded. Under others of the conventions "some vessels are entirely exempted from capture. For "instance, under the tenth convention, hospital ships are free "from capture, except in certain specified circumstances; "and under the eleventh convention certain coast fishing "vessels and local trading boats, as well as those employed on "religious, scientific, or philanthropic missions, are similarly "exempted. With regard to vessels comprised within the "tenth and eleventh conventions, the cases which might arise "would approach nearly to those of vessels which came within "the protection afforded by the Order in Council of 1854. "Dealing with the Hague Conventions as a whole, the court "is faced with the problem of deciding whether a uniform "rule as to the right of an enemy owner to appear ought to "prevail in all cases of claimants who may be entitled to "protection or relief, whether partial or otherwise." It is in this context that Sir Samuel Evans said: "Mr. Holland "argued that this is a matter not of international law, but of "the practice of this court. That view is correct. I think "that this court has the inherent power of regulating and "prescribing its own practice, unless fettered by enactment. "Lord Stowell from time to time made rules of practice, and "his power to do so was not questioned. Moreover, by "Or. XLV. of the Prize Court Rules, 1914, it is laid down that "'In all cases not provided for by these rules, the practice of "'the late High Court of Admiralty in England in prize "'proceedings shall be followed, or such other practice as the "'President may direct.' The rules do not provide for the "case now arising. I, therefore, assume that as President of "this court I can give directions as to the practice *in such "cases as that with which the court is now dealing.*" I emphasize these last words.

The justice and convenience of making the extension, if, indeed, it should truly be regarded as an extension, are obvious, and received the approval of the Privy Council in the cases to

1943

THE GLENROY.

The President.

which I shall refer shortly. But no such question arises here, and I am not prepared to deduce from the passage quoted an unfettered discretion to extend the locus standi of enemy aliens indiscriminately. In effect the decision in *The Möwe* (1) seems to me to be an excellent example of the exception proving the rule.

It must be admitted, however, that this view of the matter conflicts with that expressed in *The Gutenfels* (2). In that case the Prize Court for Egypt held that this enemy vessel, which had been detained on the outbreak of war at Port Said and had been escorted out to sea and there seized as prize by a British cruiser, must be considered to have been captured in a belligerent port. The court allowed the claimant to appear to argue that his vessel was protected from capture by the rules of international law or by an international convention. Cator J., presiding, deals with this preliminary question, founding himself on Sir Samuel Evan's judgment in *The Möwe* (1) and rejecting the suggestion that the Hague Convention No. VI. operated as a licence which divested the enemy of his alien character and thereby brought him within the recognized exception to the general rule. He went the length of saying that the rule was a barbarous rule, running counter to all sense of natural justice, which it was strange to find embedded in the practice of any English court, and, after pointing out that Great Britain and the United States alone continued to assert its legality, concluded in these words: "the fact is that the rule is a bad rule, much "more to be honoured in the breach than in the observance; "and if we must acknowledge ourselves to be so fettered by "the dead hand of outworn precedent as to recognize its "continued existence, I am, at any rate, determined to permit "all such breaches of it as my sense of equity and fair dealing "towards the enemy may demand." The actual decision, however, only went to the extent of allowing an enemy to raise any defence founded on the Hague Convention, as had already been done in the English Prize Court and to extend that indulgence to any enemy who based his claim on the terms of any convention relating to the Suez Canal or on the special relations in which Egypt stood to the British government. Subsequently the court, following the decision in *The Barenfels* (3), held that the vessel should be detained and not

(1) [1915] P. 1.
(2) (1915) 1 Br. & Col. P. C. 102,105.
(3) (1915) 1 Br. & Col. P. C. 122.

1943

THE GLENROY.

The President.

confiscated, and that, in accordance with art. 2 of Convention VI., she must be returned or her value paid to the owners at the conclusion of hostilities. On appeal (1), Sir Samuel Evans being one of the members of the Judicial Committee, the Privy Council substituted an order in the form settled in *The Chile* (2). No reference appears to have been made in the Privy Council to the question of locus standi. Inasmuch, however, as the decision turned, in part at any rate, on the application of Convention VI., the matter is carried no further than it was by *The Möwe* (3).

I am fortified in my opinion that the wider claim to an unfettered power of dispensation goes too far by the opinion of Lord Wright in the *Sovfracht* case (4). Referring to the decision of the House of Lords in *Rodriguez* v. *Speyer Brothers* (5), he says: "in any case, the decision is not one to "be extended or treated as giving the court a general liberty "to exercise the discretion which appertains to the Crown "alone to give or refuse a licence in such cases. The discretion "is for the executive and not for the court."

In *The Roumanian* (6), enemy owners of a cargo of oil, shipped in a British ship in Texas for delivery to Hamburg and discharged into tanks in a British port, were heard to argue that the oil so stored was not condemnable in prize. At first sight it would appear that this involved a further extension of the right of audience. From the statement of their contentions set out in the opinion delivered by Lord Parker it would appear that the claimants' case depended in the main on the general law of nations and that the nearest approach to reliance on an international convention was the attempt to draw from the express provisions of the Declaration of Paris, protecting enemy goods other than contraband on neutral ships, an analogous protection, not expressed in the convention itself in favour of neutral goods in British ships, but when one looks at the argument before Sir Samuel Evans (7), to which Mr. Nesbitt's researches directed my attention, it appears that the claimants were contending that, by virtue of the fact that the German owners were an international combine, most of whose shares were held by

(1) [1916] 2 A. C. 113.
(2) [1914] P. 218.
(3) [1915] P. 1.
(4) [1943] A. C. 203, 233.
(5) [1919] A. C. 59, 115, et seq.
(6) [1915] P. 56; [1916] 1 A. C. 124; 1 Br. & Col. P. C. 75; 2 Br. & Col. P. C. 536.
(7) 1 Ll. P. C. 191, 193–195, 227, 266–267.

1943

THE GLENROY.

The President.

incorporated companies of nations which were not enemies, the claim was untainted by enemy character. Thus, the case comes within the general rule. Reliance was also placed on Convention No. VI., though this point was abandoned in the Privy Council. The point that the claim was based on exemption from enemy character is made still clearer by the claimants' statement of their reasons in support of the appeal to the Privy Council (1). Reason No. 1 reads as follows: "Because the Europaische Petroleum Union, though a company "incorporated at Bremen, is in substance and reality a com- "bination of companies carrying on business in allied or "neutral countries and is not controlled by enemies of the "Crown and the petroleum was not in substance the property "of enemies of the Crown." In the alternative it was asserted that the enemy interest amounted to one-tenth and that the allied or neutral interests in the remaining nine-tenths of the cargo ought to be exempt from condemnation. On the other side, the Procurator-General in his reasons asserted that the petroleum was the property of an enemy in that it was owned by a German company having its principal office and place of business in Germany, and that the court was not called on to inquire into the status or nationality of its individual share-holders which might vary from day to day while the enemy character of the German company would continue. It is true that this aspect of the matter does not appear conspicuously in the report of the argument in the Privy Council and is not noticed in the advice tendered to His Majesty by their Lordships, but it may well explain the absence of any comment on the appearance of the claimants before the court.

In *The Pindos* (2), the claimants relied on the Suez Canal Convention, 1888. Lord Sumner, delivering the opinion of their Lordships, began by saying: "in view of the fact that "reliance was placed on immunities alleged to be claimable "under international conventions, no objection has been "raised, such as was raised in *The Möwe* (3), to the presence of "enemy owners to be heard before their Lordships on appeal," thus re-asserting the old rule. Likewise, in *The Hakan* (4), Lord Parker, after observing that the cargo, being on a neutral ship, was, even if it belonged to enemies, exempt from capture unless it consisted of contraband goods: see the Declaration of Paris; continued: "the cargo owners did not appear or

(1) 2 Ll. P. C. 380–381.
(2) [1916] 2 A. C. 193.
(3) [1915] P. 1.
(4) [1918] A. C. 148.

1943

THE GLENROY.

The President.

"make any claim in the action although according to usual "practice of the Prize Court even enemies may appear and be "heard in defence of their rights under an international "agreement." Indeed, the only difficulty arises out of a passage in *The Vesta* in the Privy Council (1), where Lord Sumner said: "Enemy claimants have been repeatedly "recognized to assert rights under international convention, "for example, *The Möwe* (2), *The Marie Glaeser* (3), or to "contest condemnation of their goods, if shipped or carried "under circumstances which give immunity from capture: "*The Roumanian* (4), *The Hakan* (5)." It was argued that the latter part of this sentence recognized the existence of a right, unrestricted by any conditions, for an enemy claimant at least to resist condemnation. Actually, as has already appeared, *The Roumanian* (4), apart from a faint reliance on Convention VI., is an illustration of the general principle inasmuch as enemy character was being denied. In *The Hakan* (5) no enemy was before the court and the only reference to immunity is in the passage quoted which depends on international agreement. *The Marie Glaeser* (3) was one of the cases in which Sir Samuel Evans reviewed the old decisions. The claim was based on art. 3 of Convention VI., which had not been ratified by Germany, and Sir Samuel Evans held that there was nothing in the affidavit which tended to show that the hostile character of the owners was suspended in any way, nor was there any suggestion made by those who claimed to appear that there was anything in the nature of a licence to trade, or any circumstance whatever differentiating the alien enemy from any other enemy who might be affected by a judgment of the Prize Court. Thus, the decision affirmed the general principle. If it had really been intended to divide the authorities giving a locus standi to an enemy claimant into two groups, it would have been more accurate to put *The Marie Glaeser* (3) and *The Roumanian* (4) together as illustrations of the general rule, and *The Möwe* (2) and *The Hakan* (5) as illustrations of the particular instance of reliance on an international convention. But I am satisfied that by the words "circumstances which give immunity from capture" their Lordships never intended to suggest the existence of a wide range of exemption from the general rule in contrast with the

(1) [1921] 1 A. C. 774.
(2) [1915] P. 1.
(3) [1914] P. 218.
(4) [1915] P. 26.
(5) [1916] P. 266.

1943

THE GLENROY.

The President.

limited area of international convention and that I was mistaken in *The Pomona* (1) in relying on these words—in accordance, I admit, with my own inclination—as giving me a discretion to hear enemy claimants in that case, seeing that the claim was based on the supposed existence of a principle of international law analogous to arts. 1 and 2 of Convention VI. long after the convention itself had been denounced by this country.

Sir Robert Aske also founded on this passage an argument that there was a distinction between the case of a claimant who asserted rights and one who merely resisted condemnation. Basing himself on the decision of the full Court of Appeal in *Porter* v. *Freudenberg* (2), which laid down that, as an alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence, he argued that an enemy owner must always have the right at least to resist condemnation of his property if he does not assert any positive right such as to the release of the goods. He gave as illustrations of what he described as this vital distinction *The Emil* (3) and *The Flamenco* (4), but these were cases of British pledgees who, as such, had no rights as against the captors, but were nevertheless allowed to be heard so as to protect their interests and, if they could, to persuade the court that as between the captors and the enemy owners the property was not condemnable. In my opinion, they afford no authority whatever for the suggested distinction between a claim by an enemy owner and the mere resistance of condemnation. In the first place, it is established beyond doubt that the owner of the goods seized in prize is in the position of a claimant and not of a defendant. The analogy to *Porter* v. *Freudenberg* (2), therefore, falls to the ground. Secondly, the common form of claim set out in the appendix to the Prize Rules contains no claim, in so many words, for release. The claim is "for the said ship," or goods as the case may be. If it succeeds this claim imports the right to immediate release unless there is some special right to detain, as under Convention VI. The claim in this case follows the usual form, with all the usual incidental claims for loss, costs, charges, damages, and expenses. Even if the suggested distinction existed it would have no application to the present case, but,

(1) Ante p. 24.
(2) [1915] 1 K. B. 857, 882.
(3) (1915) 1 Br. & Col. P. C. 257.
(4) (1915) 1 Br. & Col. P. C. 509.

in truth, there is no such distinction. In prize the essence of the claim is that the claimant owns the ship or goods, that they are not condemnable, and, therefore, that they should be released to him. The special case of what is usually called the *Chile* order is really no exception as the claimant's right to the property is recognized, though its restoration, or the equivalent in compensation, is postponed until the end of hostilities.

Coming now to the *Sovfracht* case (1), this expressly decided that the operation of the rule refusing a persona standi in judicio is always subject to permission being given by royal licence: see the Lord Chancellor, proposition No. 7, and Lord Wright; and I have no doubt whatever that the same applies to a court of prize in any case in which prize law refuses a locus standi. I must, however, deal specifically with certain passages which it was suggested create a difficulty in holding that, after this decision, a Prize Court can recognize any exception to the rule refusing a persona standi in judicio. The first is in the Lord Chancellor's summary of his own conclusions: "1. The test of enemy character is fundamen-"tally the same whether the question arises over a claim to "sue in our courts, or over issues raised in a court of prize, "or over a charge of trading with the enemy at common law." The general truth of this proposition in its application to prize law cannot, of course, be doubted, and, inasmuch as what I will call the old rule in prize is based on a suspension of enemy character pro hac vice, it is not affected by the generality of the above statement. The difficulty is that this general statement of principle ignores the special case arising out of Convention VI. where the idea that enemy character was suspended was specifically rejected. The same difficulty appears even more acutely in Lord Wright's opinion. He says: "The general question of law to be determined is "whether enemy character as against one belligerent attaches "to a person by reason of the fact that the previously neutral "or friendly territory in which he resides or carries on business, "that is, has his place of residence or commercial domicil, is "subjugated and occupied by the other belligerent. Before "examining the relevant authorities I should explain that the "test which has been taken of enemy character in English law "is not nationality, but domicil in the sense of settled residence "or in the case of traders commercial domicil. Domicil in the

(1) [1943] A. C. 203, 211, 218, 219, 227.

1943

THE GLENROY.

The President.

"strict legal sense is not necessarily relevant. Some of these "cases were decided in the Prize Court, others in courts of "common law. However, the right to sue or prosecute an "action in court, the right to claim to be exempt from seizure "and condemnation in prize, the liability to punishment for "the offence of trading with the enemy, all depend alike on "whether the person has enemy character in what has been "called the technical or territorial sense. The test is objective "and depends on facts, not on the person's prejudices or "passions, his patriotism, or his determination to free his "country whenever he can." Again, dealing with the point that military occupation of a place outweighs all considerations founded on the bare legal ownership of the soil, Lord Wright says: "This was said, no doubt, in reference to questions of "public international law, but the same principle for deter- "mining enemy character would apply to questions of municipal "law such as whether there is a right to claim a persona "standi in judicio, whether there is a liability for the offence "of trading with the enemy, and also whether property is "subject to arrest or condemnation in a prize court."

If these statements of the law necessarily lead to the conclusion that domicil in the sense of settled residence or commercial domicil is the sole test, in a prize court as in our municipal courts, of the right to claim to be exempt from seizure and condemnation to the exclusion of any consideration based on the nature and quality of the claim itself, I should be obliged, respectfully, to decline to be bound by them in prize. That they were not, however, intended to exclude from this right the cases covered by the old rule in prize is, I think, made clear by Lord Wright's adoption of Lord Stowell's judgment in *The Hoop* (1). It is true that in his citations from that judgment Lord Wright does not include the passage dealing with the Prize Court which I have already quoted, but there is no hint of disapproval of any part of what he describes as the classic statement of the rule, and I am not, therefore, prepared to assume that their Lordships intended to unsettle the established procedure in prize. There is not a single reference in any of their Lordships' opinions to the peculiar case of the claims based on Convention VI., as one would have expected if it had been intended to throw any doubt on the validity either of the decisions in the Privy Council recognizing this extension of the old rule or of the rule itself. The *Sovfracht*

(1) 1 C. Rob. 196.

1943

THE GLENROY.

The President

case (1), however, in my opinion, does emphasize the point that this court should be careful not to extend the exceptions to the general disability of enemy status one whit further than can be justified by authority.

For these reasons I have come to the conclusion that I have no right to extend to an alien enemy any indulgence beyond what was settled during the last war as being the law of nations administered by the Prize Court of this country in this respect. That being so, my decision is that as regards the claim at present formulated on behalf of the Mitsui Co. the claimant has no locus standi, and, therefore, he must obtain some authority from the Crown to entitle him to be heard thereon. On the other hand, I hold that the claimant has a locus standi to prosecute his claim on behalf of the London branch without any further authority.

There only remains the question of the practice to be followed so as to give effect to these principles. In the first place, the affidavit required to be filed by an alien enemy under Or. II., r. 22, and Or. III., r. 5, respectively, should show on the face of it the capacity in which the deponent purports to speak on behalf of the claimants. Secondly, the grounds of the claim itself should be set out with sufficient particularity so as to disclose, among other things, the basis of the claimant's assertion of a persona standi in judicio. Thirdly, the case of a claimant who has already entered an appearance before becoming an alien enemy is not specifically dealt with by the rules, but this is clearly a matter coming within the jurisdiction of the court to regulate its own procedure under Or. XLV. of the Prize Rules. In such a case I do not think that a fresh appearance need be entered, but, after becoming an alien enemy, the claimant should be required to file an affidavit on the same lines as if he were entering an appearance. If the claim itself has already been filed it should be amended, if necessary, to deal with the new situation, and should be verified by the affidavit. In default of a proper and sufficient affidavit, and whether the claimant was originally an enemy or has since become one, it will be open to the Procurator-General to move to strike out the appearance, or the claim, or both, as the case may be. Fourthly, the duty of the court, when a doubt arises, to assure itself that an enemy claimant can sustain a persona standi in judicio and, if so, is regularly represented before the court, cannot be abrogated, but it is manifestly inconvenient that such matters should be left to

(1) [1943] A. C. 203.

1943

THE GLENROY.

The President.

the initiative of the court or that they should stand over until the hearing itself when all the expense of preparation for trial has been incurred. Accordingly, if in any case the Procurator-General is not satisfied that the claimant is in order without some authority from the Crown, he should himself bring the matter to the test by an interlocutory application under Or. xx., as has most properly been done in this case. This may take the form of an application for directions, for a further affidavit, for further and better particulars, or otherwise as the circumstances of the case may require. It is unnecessary to go further into detail. I would only add that if the Procurator-General has reason to believe that an assertion of locus standi, apparently good on the face of the affidavit, is merely colourable, the same procedure will be open to him.

In conclusion, I have been invited to deal in general terms with the question of the retainer of a solicitor by an enemy claimant. Now solicitors are officers of the court, and their relations with the court are governed by the municipal law. This question of retainer on behalf of an enemy is fully dealt with in the *Sovfracht* case (1), particularly in the opinion of Lord Porter, and it would be neither useful nor becoming for me to attempt to add anything. It would manifestly be impossible for the officers of the registry to undertake, as it were, to act as passport examiners on the threshold of the court to ascertain that the solicitor's retainer is in order. The court is entitled to assume, until the contrary appears, that its officers are conducting themselves properly. On the other hand, if in the course of the proceedings a doubt arises as to the validity of a solicitor's retainer the question can be raised either by the Procurator-General or by the court itself, and dealt with on the merits of the particular case. In this case no such question has been raised, and, therefore, I do not think it is either necessary or desirable that I should say anything more on this aspect of the matter.

Having regard to the importance of the decision not only to himself, but to many opposing litigants, the Procurator-General has offered to pay the taxed costs of the claimant in any event, and I so direct.

Solicitor for Procurator-General: *Treasury Solicitor.*
Solicitor for claimant: *Waltons & Co.*

(1) [1943] A. C. 203.

E. C. M. T.

END OF VOL. AND OF PROBATE SERIES FOR 1943.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1943, will be as follows:—

In the First Series,
[1943] Ch.

In the Second Series,
[1943] K. B. [1943] P.

In the Third Series,
[1943] A. C.

INDEX.

COLLISION (AT SEA). *See* SHIPPING.

COSTS. *See* sub tits. DIVORCE; SHIPPING.

DESERTION. *See* DIVORCE.

DIVORCE — *Condonation — Evidence — Marital intercourse—No fraud by wife—Revival of condoned adultery — Desertion less than statutory period.*
HIGGINS *v.* HIGGINS AND BANNISTER **Pilcher J. 58**

2. —— Costs — Poor person's petition — Inquiries by King's Proctor — Application to expedite decree absolute. *See* HAYS *v.* HAYS, sub tit. DIVORCE (DECREE ABSOLUTE).

3. —— —— *Wife's costs — Security — Appeal by husband against dismissal of petition.*
KING *v.* KING - - - **C. A. 91**

4. —— *Decree absolute — Expedition — Application to judge of assize — Convenient course to be followed — Costs — Inquiries by King's Proctor—Poor persons' petition.*
HAYS *v.* HAYS - - **Lord Merriman P. 55**

5. —— *Desertion — Parties living under same roof—Wife's absences and silences—Withdrawal from sexual intercourse—Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.
LITTLEWOOD *v.* LITTLEWOOD **Pilcher J. 11**

6. —— —— *Parties living under same roof for part of statutory period, but leading separate lives—Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2 (*b*).
WILKES *v.* WILKES - - **Hodson J. 41**

7. —— *Maintenance — Computation — Serving Air Force officer's income — Allowances in addition to pay.*
COLLINS *v.* COLLINS **Lord Merriman P. 106**

8. —— —— *" Conduct of the parties " — Undefended suit for divorce — Charge of adultery against wife petitioner first alleged on application for maintenance — Res judicata—Public policy — Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-s.* 1.
ROBINSON *v.* ROBINSON **Henn Collins J. 43**

DIVORCE—*continued.*

9. —— —— *Needs of wife — Wife abroad — Impossibility of sending money out of United Kingdom — Maintenance of wife by friends—Suspension of maintenance order—Administration of Justice (Miscellaneous Provisions) Act,* 1938 (1 & 2 *Geo.* 6, *c.* 63), *s.* 14, *sub-s.* 1 (*b*).
ACWORTH *v.* ACWORTH - - **C. A. 21**

10. —— —— *Order for payment of yearly sum to be secured by deed — Deed executed — Rescission of order—Jurisdiction.*
BLYTH *v.* BLYTH - - - **C. A. 15**

11. —— *Practice — Petition — Co-respondent — Making alleged male adulterer co-respondent — Name and identity unknown — Dispensation on special ground — Matrimonial Causes (Amendment) (No.* 1) *Rules,* 1943 (*St. R. & O.,* 1943, *No.* 240, *L./*7), *r.* 3 — *Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 177, *sub-s.* 1.
EASTHAM *v.* EASTHAM - **Pilcher J. 53**

12. —— —— —— *Service — Dispensation — Knowledge by respondent of petition or intention to prosecute it — Opportunity to defend — Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *s.* 42.
LUCCIONI *v.* LUCCIONI - - **C. A. 49**

13. —— —— *Re-hearing — Cause heard by judge alone — Application to Divisional Court—" Error "—Preparation of applicant's case prejudiced—Matrimonial Causes Rules,* 1937 (*St. R. & O.,* 1937, *No.* 1113, *L./*14), *r.* 36 (1.), (2.).
PETTY *v.* PETTY - - **Divl. Ct. 101**

14. —— *Variation of settlement — Covenants for payment of annuities to wife after the husband's death—" If she shall so " long remain a widow and unmarried "— Decree of divorce—Subsequent death of husband —Wife's application to vary settlements by omitting condition of widowhood—Preliminary objection that settlements ceased on husband's death—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.
JACOBS *v.* JACOBS - - - **C. A. 7**

DIVORCE—*continued.*

15. —— —— *Post-nuptial settlement—No recital of existing marriage or wife or child in settlement—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.
Joss *v.* Joss - - **Henn Collins J. 18**

ESTOPPEL—*Maintenance of action—Previous action between same parties—Different cause of action—Collision at sea—Claim by administrators for loss of life—Previous claim as personal representatives for loss of effects—Negligence—Damage—Remoteness—Novus actus interveniens.*
The Oropesa - - - - **C. A. 32**

GARNISHEE ORDER — *Salary — Indian civil servant—"Sterling overseas pay"—Debt "owing or accruing" from Crown to civil servant—R. S. C., Or.* XLV., *r.* 1.
Lucas *v.* Lucas and High Commissioner for India - - - - **Pilcher J. 68**

HUSBAND AND WIFE—Summary proceedings between. *See* sub tit. Justices.

JUSTICES — *Husband and wife — Wilful neglect to maintain—Venue—Wife's application for order in district of husband's residence—Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict. c.* 39), *s.* 4.
Clarke *v.* Clarke - - **Divl. Ct. 1**

MAINTENANCE. *See* Divorce.

NEGLIGENCE — Damage — Remoteness — Novus actus interveniens. *See* The Oropesa, sub tit. Estoppel.

PRIZE. *See* Shipping.

SETTLEMENT—*Variation. See* Divorce.

SHIPPING—*Collision—Costs—Both to blame in unequal degrees—Discretion of court.*
The Salabangka - - **Bucknill J. 13**

2. —— —— *Towage — Conditions — "On hiring of tug for towage services master "and crew become servants of vessel towed"— "Conditions of towage apply while tug is in "attendance upon, or engaged in any manœuvre "for purpose of making fast to, the vessel"— Time of coming into operation of hiring clause—Manœuvre to make fast.*
The Ramsden - - **Bucknill J. 46**

SHIPPING—*continued.*

3. —— *Damage — Moorings — Breaking adrift — Duties of harbour authorities — Inspection and maintenance—Onus of proof.*
The Quercus - - **Bucknill J. 96**

4. —— *Inquiry into conduct of certificated officer — Charge — Particularity — Finding —Need to state reasons — Unfitness to discharge duties from incompetency—Evidence —Sufficiency of isolated act of neglect or default—Costs—Power of Divisional Court to deal with costs of tribunal making inquiry— Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *s.* 471, *sub-ss.* 1, 2, 3.
The Empire Antelope. The Radchurch **Divl. Ct. 79**

5. —— Prize — Claim by enemy shipowners — Hearing. *See* The Pomona, *infra.*

6. —— —— *Condemnation — Enemy vessel in British port—Under civil arrest before outbreak of war—Anticipatory embargo—Claim by enemy shipowners—Hearing—Hague Convention No. VI., of* 1907, *preamble, arts.* 1, 2.
The Pomona - **Lord Merriman P. 24**

7. —— —— *Costs—Crown party to proceedings—Reference to assess amount of compensation in lieu of freight.*
The Panaghiotis **Lord Merriman P. 4**

8. —— ——*Enemy — Appearance — Authority to prosecute claim—Enemy company—Claim by controller appointed to wind-up London branch—Licence—Form of affidavit—Duty of Procurator-General in case of doubt—Prize Court Rules,* 1939, *Or.* II., *r.* 22; *Or.* III., *r.* 5; *Or.* XX.
The Glenroy - **Lord Merriman P. 109**

VARIATION OF SETTLEMENT. *See* Divorce.

WILL — *Soldier — "Actual military "service" — Soldier called out before embodiment or mobilization of forces or declaration of war—Service required to ensure preparedness for defence of realm against external danger— Wills Act,* 1837 (1 *Vict. c.* 26), *s.* 11.
In the Estate of Rippon **Pilcher J. 61**